Petition

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81-334

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ALEXANDER L. STEVAS,
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No. ....
IN THE

Supreme Court of the United States

October Term, 1981.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,
Petitioner,

vs.

CALIFORNIA STATE COUNCIL OF CARPENTERS and CARPENTERS 46 NORTHERN COUNTIES CONFERENCE BOARD,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented.

1. Whether a union's claim that an employers' association and its members engaged in unilateral concerted activity to weaken the collective bargaining relationship between the Union and the association states a claim cognizable under Section 1 of the Sherman Act, 15 U.S.C. Section 1.

2. Whether Section 20 of the Clayton Act, 29 U.S.C. §52, shields employers from liability under the federal antitrust laws for concerted activities undertaken unilaterally against a union with which the employers have a collective bargaining relationship.

3. Whether a Union's claim that an employers' association and its members breached their collective bargaining relationship with the Union and engaged in statutorily recognized unfair labor practices is also cognizable under federal antitrust laws.

4. Whether a union has standing to seek damages under Section 1 of the Sherman Act for individual union members' economic losses as a result of alleged concerted activity directed against the union members' employers.

Parties to This Action.

The parties to this action are:

1. Associated General Contractors of California, Inc., a non-profit trade association;

2. The California State Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, an unincorporated labor organization;

3. The Carpenters 46 County Conference Board, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, an unincorporated labor organization.

4. The following union entities, though not formal parties to the action, are purportedly represented by the labor organizations listed above:

a. Bay Counties District Council, and Local Union Nos. 22, 34, 35, 36, 42, 102, 162, 194, 478, 483, 550, 642, 848, 1068, 1149, 1158, 1408, 1473, 1622, 1861, 2046, 2095, 2164, 2565, and 3116.

b. Central California District Council, and Local Union Nos. 1959, 2559, 2561, 2652, 2687, 2688-S, 2707-S, 2728-S, 2749-S, 2762-S, 2801, 2838-S, 2927-S, 3088, 3170-S, 2882, and 3184-S.

c. Delta-Yosemite District Council, and Local Unions Nos. 266, 386, 1235, 1418, and 1869.

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CALIFORNIA STATE COUNCIL OF CARPENTERS and CARPENTERS 46 NORTHERN COUNTIES CONFERENCE BOARD,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Associated General Contractors of California, Inc., respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 5, 1981.

I.

OPINIONS BELOW.

The Opinion of the Court of Appeals (Appendix A, *infra*) is reported at 648 F.2d 527; that Court's Order and Memorandum Opinion denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix B, *infra*) was filed on May 22, 1980, and is reported at 648 F.2d 543. The Decision of the U.S. District Court for the Northern District of California (Appendix C, *infra*) was filed on August 4, 1975; a Supplemental Order was filed on September 10, 1975. The Decision and Supplemental Order of the U.S. District Court for the Northern District of California are reported at 404 F. Supp. 1067.

II.
JURISDICTION.

The Opinion of the Court of Appeals for the Ninth Circuit was filed on November 20, 1980. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on December 1, 1980; the Petition for Rehearing and Suggestion for Rehearing En Banc were denied on May 22, 1981.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Sec. 1254(1).

This Petition is timely filed with this Court under the provisions of 28 U.S.C. Sec. 2101(c).

III.
STATUTORY PROVISIONS.

The relevant statutory provisions are:

1. Sherman Act, Section 1, 15 U.S.C. Section 1;
2. Clayton Act, Section 4, 15 U.S.C. Section 15;
3. Clayton Act, Section 6, 15 U.S.C. Section 17;
4. Clayton Act, Section 20, 29 U.S.C. Section 52;
5. Norris-LaGuardia Act, Sections 1-15, 29 U.S.C. Sections 101-115.

Pertinent portions of these statutory provisions are reproduced at Appendix D, *infra*.

IV.
STATEMENT OF THE CASE.

This is an action instituted by the California State Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and the Carpenters 46 County

Conference Board (referred to collectively hereafter as "the Union") in the U.S. District Court for the Northern District of California on February 9, 1975.

Only one entity, Associated General Contractors of California, Inc. (hereinafter "AGC") was named as a defendant. A computer printout of AGC's members was attached to the original Complaint, and the members named in the printout were designated as co-defendants in the body of the Complaint.

AGC filed a Motion to Dismiss the action for failure to state a claim upon which relief could be granted. Following the filing of the Motion to Dismiss, the Union secured the Court's permission to file a First Amended Complaint to "cure alleged defects claimed in a Motion to Dismiss." The Court permitted the filing of the First Amended Complaint, but, at the request of AGC, ordered that the pending Motion to Dismiss "be deemed applicable to the First Amended Complaint."

The First Amended Complaint sets forth five separate claims for relief, each founded upon the same allegations.[1]

The first count alleges that AGC and its members engaged in concerted activities in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1. The second count claims that the same acts constitute violations of the collective bargaining agreements entered into by AGC and the Union, and seeks damages under Section 301 of the Labor Management Relations Act, 28 U.S.C. Section 185; this count also seeks an order compelling arbitration of the Union's claims, pursuant to arbitration provisions contained in the collective bargaining agreements between AGC and the Union. The third count seeks damages pursuant to the California Cartwright Act, Cal. Business and Prof. Code §16700, *et seq.* (California's antitrust statute) for the same acts. Finally, the fourth and fifth count seek damages for the same acts based on theories of negligent and intentional interference with contractual relations.

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[1] A verbatim text of the First Amended Complaint is attached to this Petition as Appendix E.

On August 4, 1975, the U.S. District Court filed its Memorandum and Order dismissing the entire case except for the second count. Subsequently, upon reconsideration on the Court's own motion, on September 10, 1975, the U.S. District Court entered a further Order dismissing the action in its entirety.

The Union chose not to seek leave of Court to further amend its Complaint. Instead, on October 9, 1975, the Union filed a Notice of Appeal.

The case was argued before a panel of the U.S. Court of Appeals for the Ninth Circuit in January, 1980. On November 20, 1980, the panel issued an opinion (one judge dissenting) sustaining the District Court's dismissal of counts two through five of the First Amended Complaint, but reversing the District Court's dismissal of the Union's Sherman Act claim.

A Petition for Rehearing and Suggestion for Rehearing En Banc were timely filed. An active judge of the Court requested a vote on the Suggestion for Rehearing En Banc. The vote was taken, but failed to obtain a majority of the active judges of the Court. The panel therefore issued an order on May 22, 1981, denying the Petition for Rehearing and rejecting the Suggestion for Rehearing En Banc. The panel also issued a further opinion to which one member of the panel dissented. (App. "B.").

V.

NATURE OF THE UNION'S CLAIM.

Because the Union elected not to seek further leave to amend its Complaint after the Motion to Dismiss the First Amended Complaint was granted, this case must be analyzed solely in terms of what the Union alleged in the First Amended Complaint.[2]

It is helpful to begin with a statement of the pertinent allegations:

a. The Union purports to bring the suit as a class action "on behalf of each of the affiliated local unions and District Councils" described in an exhibit to the Complaint. The class is described as consisting of "all affiliated local unions and District Councils who have been, and continue to be, or might be adversely affected by the practices complained of herein." (First Amended Complaint, Par. VI).

b. The defendants are Associated General Contractors of California, Inc. ("AGC") and those members listed on a computer printout attached as an exhibit to the complaint (Par. XVII). Each of these defendants "is sued herein individually" (Par. XVIII). Each defendant is alleged to be the agent and servant of each other defendant (Par. XX).

c. Plaintiffs and their predecessors, and each of them, and defendants and their predecessors, and each of them, are alleged to have been parties to collective bargaining agreements with each other for over twenty-five years (Par. XII). There are other parties to these collective bargaining agreements, referred to as "memorandum contractors," who are not members of AGC, and who are not named as defendants (Par. XIX).

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[2] The issues which petitioner seeks to bring before this Court are legal and jurisdictional, rather than factual; no purpose would be served by remanding the parties to the trial court for a lengthy, expensive, and potentially fruitless hearing before passing on these issues. This Court has not previously shown itself to be reluctant to evaluate antitrust cases based on the pleadings and other pre-trial papers; see *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 100 S.Ct. 502 (1980); *Gulf Oil Corporation v. Copp Paving Co.*, 419 U.S., 186, 203, 95 S.Ct. 391, 402 (1974). It is clear that an adequate jurisdictional basis must be shown by the complaint. ("To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings . . ." *McLain, supra*, 100 S.Ct. at 509.) Moreover, the Union had notice of each of the legal points raised by petitioner before its First Amended Complaint was filed, since the Motion to Dismiss was filed and served before the First Amended Complaint. 404 F. Supp. at 1069.

d. The defendants are alleged to "have entered into a plan, scheme, agreement and conspiracy . . . whose purpose and ends are to abrogate, destroy, undermine, and weaken the collective bargaining relationship between plaintiffs and each of them and defendants and each of them, and between plaintiffs and other parties to the above described collective bargaining agreements." (Par. XXIII).

e. Plaintiffs claim that the following acts were performed in furtherance of this "conspiracy":

1. Unspecified defendants "changed names and corporate status without reason." (Par. XXIV(1)).

2. Unspecified defendants "created and maintained double-breasted contracting situations, in which contractors have established and maintained union and non-union divisions, departments, and/or other such entities" (Par. XXIV(2)).

3. The defendants "advocated, encouraged, induced, and aided non-members of defendant Associated General Contractors of California, Inc. to refuse to enter into collective bargaining relationships with plaintiffs . . ." (Par. XXIV(3)).

4. The defendants "aided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs . . ." (Par. XXIV(4)).

5. The defendants encouraged and aided members and non-members of AGC "to enter into subcontracting agreements with subcontractors who are not signatories to any

collective bargaining agreements with plaintiffs . . .'' (Par. XXIV(5)).

6. The defendants ''held open-shop meetings'' for AGC members and non-members where these parties were ''induced'' and ''encouraged'' to maintain non-union shops, and ''double-breasted operations . . .'' (Par. XXIV(6)).

7. The defendants ''breached the collective bargaining agreements'' between plaintiffs and defendants by violating various terms thereof and ''by generally weakening the good-faith requirement of the collective bargaining agreements.'' (Par. XXIV(7)).

These activities are alleged to constitute restraints of trade in violation of the Sherman Act (15 U.S.C. Section 1).

VI.

REASONS THE PETITION SHOULD BE GRANTED.

A. The Decision of the Court of Appeals Is in Conflict With Established Case Law in the Second, Fifth, Sixth and Eighth Circuits, and With Prior Case Law in the Ninth Circuit.

The Ninth Circuit's opinion in this case marks, so far as petitioner is aware, the first time that a U.S. Court of Appeals in any circuit has held that employers, acting unilaterally and not in collusion with labor groups, may be liable under federal anti-trust laws for damages suffered by a Union and its members arising out of acts designed to ''weaken the collective bargaining relationship'' between the employers and the Union.

Previous cases in both U.S. Circuit Courts and U.S. District Courts have held that acts undertaken by employers acting collectively in a labor context without the participation of labor groups are not properly the subject of the antitrust laws. *See Prepmore Apparel, Inc. v. Amalgamated Clothing Workers of America,* AFL-CIO, 431 F.2d 1004

(5th Cir. 1970) *cert. dismissed,* 404 U.S. 801 (1971) [alleged conspiracy between corporation and two of its officers and a second company to injure a union and destroy its operations did not state a claim under Section 1 of the Sherman Act]; *Kennedy v. Long Island Railroad,* 319 F.2d 366 (2d Cir. 1963), *cert. denied,* 375 U.S. 830 (1963) [allegation that employers conspired to damage a labor union by entering into a strike insurance plan failed to state a claim for relief under Section 1 of the Sherman Act]; *United Brick and Clay Workers v. Junction City Clay Co.*, 158 F.2d 552 (6th Cir. 1946) [employer conspiracy directed against a union and its members did not state a claim under Section 1 of the Sherman Act]; *Clothing and Textile Workers Union v. J. P. Stevens Co.*, 475 F. Supp. 482 (S.D.N.Y. 1979) *appeal dismissed as moot,* 638 F.2d 7 (2d Cir. 1980) [conspiracy between a corporate conglomerate and other non-union parties to injure a union did not state a claim for relief under the Sherman Act]; *Clune v. Publishers Association of New York City,* 214 F. Supp. 520-521 (S.D.N.Y. 1963), *aff'd. mem.*, 314 F.2d 343 (2d Cir. 1963) [anti-union concerted activity (a lockout) carried out by members of Publishers Association) did not form basis for claim for relief under the Sherman Act]; *Amalgamated Meat Cutters v. Wetterau Foods,* 579 F.2d 133 (8th Cir. 1979) [employers' anti-union activities during a strike did not give rise to a claim under Section 1 of the Sherman Act]; *Plumbers and Steamfitters Local 598 v. Morris,* 511 F. Supp. 1298 (E.D. Wash. 1981) [multi-employer association and its members did not violate federal antitrust law by engaging in a lockout and other concerted activity]; *Carps. Local 1846 v. Pratt-Farnsworth,* 511 F. Supp. 509 (E.D. La. 1981) [employer conspiracy to commit unfair labor practices did not state a claim under the Sherman Act].

The root of these decisions is the determination by this Court in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S.Ct. 982 (1940) that the Sherman Act is concerned solely with restraints in commercial markets:[3]

> ". . . This court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities unless the Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods or services . . ."

Under *Apex*, it does not matter whether the alleged miscreant is an employer or a union so long as the conduct arises from a dispute occurring in a labor context.[4]

As in *Apex*, and the cases cited above which follow the reasoning of *Apex*, there is nothing in the Union's Complaint in this case which would suggest any direct restraint upon the marketing of goods and services.[5] Instead, the entire focus of the First Amended Complaint is upon alleged anti-union acts perpetrated by AGC and its members, allegedly damaging the collective bargaining relationship between AGC and the Union.

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[3] In *Hunt v. Crumboch*, 325 U.S. 821, 65 S.Ct. 1545 (1945), the U.S. Supreme Court, writing through Mr. Justice Black, stated: "The controversy in the instant case, between a union and an employer, involves nothing more than a dispute over employment, and the withholding of labor services. It cannot therefore be said to violate the Sherman Act, as amended. That Act does not purport to afford remedies for all torts committed by or against persons engaged in inter-state commerce." 65 S.Ct. at 1548, 325 U.S. at 826.

[4] "[Chief Justice] Stone was careful to say [in *Apex*], however, that his test did not vary depending on the nature of the alleged wrongdoer, whether union or management. The *Apex Hosiery* approach was not a matter of a statutory union exemption; the Sherman Act, as written, would simply not apply to a certain class of restraints. Employers, or employers in combination with unions, would presumably be as free as unions acting alone to halt competition grounded in wage differentials. In short, the Sherman Act would be confined to restraints on the product market, and the labor market would be beyond its ken." St. Antoine, "*Connell: Antitrust Law at the Expense of Labor Law*," 62 Va.L.Rev. 603, 606 (1976)

Petitioner has no quarrel with decisions such as *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797,

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[5] Earlier case law in the Ninth Circuit is consistent with this reading of *Apex*, and conflicts with the Circuit opinion in this case.

In *Schatte v. I.A.T.S.E.*, 182 F.2d 158 (9th Cir. 1950), the Ninth Circuit upheld the dismissal of a suit seeking damages for alleged violation of the Sherman Act. In *Schatte*, it was alleged by the plaintiffs, members of a union, that the defendant employers had conspired to hire and to coerce other employers to hire, only members of a rival union, thereby forcing plaintiffs out of business. The Ninth Circuit found that no claim was stated under the Sherman Act, reasoning as follows:

> "The complaint alleges that appellees compelled minor studios, competitors of employer appellees, to employ allegedly less efficient members of the I.A.T.S.E. in place of the allegedly more efficient members of the appellants' union, with the intent and effect of increasing the production costs of such competitors, and of ultimately driving the competitors out of business and enabling employer appellees to increase the prices of their products. Apart from the sufficiency of allegations of damage to appellants under 15 U.S.C.A. Sec. 15, *these alleged acts do not constitute a violation of the antitrust laws*. This is made clear by the Supreme Court in *Apex Hosiery Co. v. Leader*, 1940, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1131, 128 A.L.R. 1044, in a detailed discussion of the types of acts which constitute restraints of trade within the contemplation of those laws. It is there pointed out that the term 'restraint of trade' in the anti-trust laws is to be given the meaning which the phrase had at common law, and that '[the Supreme] Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services * * *.' 310 U.S. 469, 495, 60 S.Ct. at page 993, 84 L.Ed. 1131, 128 A.L.R. 1044. *Compelling others to adopt certain employment policies is not a restraint upon commercial competition in this sense.*" [Emphasis supplied.]

The rule set forth in *Schatte* has been followed by the Ninth Circuit in two other cases: *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); and *National Association of Broadcast Employees v.. I.A.T.S.E.*, 488 F.2d 124 (9th Cir. 1973).

65 S.Ct. 1533 (1945) and *Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616, 95 S.Ct. 1830 (1975), in which employers were held to be potentially liable under the Sherman Act for direct restraints upon the marketing of goods or services. In these cases, the defendant employers *combined with* union groups to effect such restraints. In the present case, by contrast, the employers were acting unilaterally, in their own interest.

Nor does petitioner question the holding of such cases as *Carpenters District Council v. United Contractors Association of Ohio*, 484 F.2d 119 (6th Cir. 1973), *modified*, 539 F.2d 1092 (6th Cir. 1976); *International Association of Heat & Frost Insulators and Asbestos Workers v. United Contractors Association, Inc.*, 483 F.2d 384 (3d Cir. 1972), *modified*, 494 F.2d 1353 (3d Cir. 1974), and *Tugboat, Inc. v. Mobile Towing Company*, 534 F.2d 1172 (5th Cir. 1976). These cases concern employer combinations with "sham" unions or with rival unions to drive competing unions out of business. As in *Allen Bradley*, these cases involve potentially illegal combinations between employers and unions, rather than concerted activity solely carried out by employers.

This Court has not yet considered a case in which an employer, rather than a union, is alleged to have breached the antitrust laws in the context of a labor dispute. This has caused some speculation among commentators about the approach the court would take in such a case. *See, e.g.*, *"Comment: Antitrust Law in the Labor-Management Context: The Employer as Defendant and the Union as Plaintiff"*, 32 Baylor L.Rev. 385 (1980); Goldberg, "*Antitrust: The Union as Plaintiff*," Southwestern Legal Foundation, *Proceedings of the 26th Annual Institute on Labor Law*, 175 (1980). Because of the number of circuit court and district court decisions (cited *supra*) which have considered the issue, and the conflict of the present case with those opinions, a dispositive opinion by this Court would be of great benefit and would provide guidance to the lower courts and litigants in future disputes.

B. The Ninth Circuit Has Misapplied This Court's Holding in *Connell Construction*.

The basic thrust of the Ninth Circuit's opinion is that the Union's claim is viable under Section 1 of the Sherman Act because it presents "virtually the obverse" of the situation considered by the U.S. Supreme Court in *Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616, 95 S.Ct. 1870 (1975). 648 F.2d at 532. In *Connell*, this Court found that a union's agreement with a stranger contractor (Connell) that only subcontractors employing members of the union would be hired by Connell, was subject to scrutiny under the antitrust laws. This Court found the absence of a collective bargaining relationship between the union and Connell to be critical, and found that the agreement restrained competition and wages "in ways that would not follow naturally from elimination of competition over wages and working conditions." 421 U.S. at 624.

In the present case, by contrast, the Union has sued only an employers' association (and its members) with which the Union *has* had a collective bargaining relationship for over 25 years. (First Amended Complaint, Par. XII). The existence of the collective bargaining relationship gives rise to remedies under the federal labor laws for each of the acts of which the Union complains.[6]

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[6] The Ninth Circuit's opinion explicitly notes the existence of potential remedies under the National Labor Relations Act for the conduct complained of. 648 F.2d at 532, n.6.

In *Connell*, a majority of this Court agreed that a contractor *without any* collective bargaining relationship with the union could utilize the Sherman Act to attack a subcontracting agreement which a stranger union had successfully forced it to sign. However, nothing in *Connell* suggests that this Court would have taken the same view had Connell and the union had a collective bargaining relationship.[7] Had such a collective bargaining relationship existed, disputes between Connell and the Union would have been subject to a wide panoply of remedies provided by federal labor law.[8]

Moreover, the *Connell* opinion explicitly notes that the agreement at issue in that case would have a pernicious "topdown" organizing effect on subcontractors, a practice condemned by Congress. 421 U.S. at 632. In this case, as the U. S. District Court noted, the union is complaining that the employers are *impeding* its topdown organizing efforts by subcontracting work to subcontractors with no collective bargaining agreement with the Union, and encouraging and coercing others to do the same. If *Connell* was intended to *shield* employers from impermissible union pressure to engage in topdown organizing, surely it perverts the intent of that opinion to convert it to a *sword* to compel employers to subcontract only to unionized subcontractors, or face prolonged antitrust litigation as a penalty for refusing to do so. As the dissenting member of the Ninth Circuit panel noted: "Those with a taste for irony will no doubt savor the spectacle of *Connell* self-destructing."[9] 648 F.2d at 541.

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[7] Had such a relationship existed, it would clearly have been permissible for the union to seek, as a portion of a collective bargaining agreement, a provision limiting the subcontracting of some types of work; see *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 85 S.Ct. 398 (1964); *National Woodwork Mfgs. Assn. v. NLRB*, 386 U.S. 612, 87 S.Ct. 1250 (1967). The significance of the absence of a collective bargaining relationship to the holding in *Connell* has been noted in a number of decisions; see, *e.g.*, *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building & Construction Trades Council*, 609 F.2d 1370, 1373 (3d Cir. 1979) (*en banc*); *Carpenters Local No. 1846 v. Pratt-Farnsworth*, 511 F. Supp. 509, 517-518 (E.D.La. 1981).

[8] *See* the discussion of this point in *Clothing and Textile Workers Union v. J. P. Stevens Co., supra*, 475 F. Supp. at 490.

C. The Ninth Circuit's Decision Creates Inconsistent Rules and Remedies to Govern Labor Conduct.

The Ninth Circuit explicitly noted that the conduct alleged in the First Amended Complaint "might also have provided a basis for unfair labor practice proceedings under Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act." 648 F.2d at 532. Relying on this Court's decision in *Connell,* the Circuit nevertheless held that "where there is an independent remedy that is consistent with the NLRA, the parties may have a choice of federal remedies." *Connell, supra,* 421 U.S. 616, n. 17, 95 S.Ct. 1830, 1841, n. 17 (1975).

Petitioner believes the Ninth Circuit has overstated and misconstrued the dicta from the *Connell* decision on which its decision relies.

There is nothing "consistent" about the remedies which the Union seeks to invoke under the Sherman Act, and those which would be available to it under Section 301 of the

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[9] As the dissent notes, the *in terrorem* threat of antitrust litigation may offer the unions an effective tool to control the subcontracting practices of employers, if the Ninth Circuit opinion is not reversed. 648 F.2d at 541. The type of market control which the Union seeks to preserve in this case is the type of restraint which the Third Circuit in *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building & Construction Trades Council,* 609 F.2d 1368 (1979) (*en banc*) found potentially violative of the antitrust laws, relying on this Court's reasoning in *Connell.*

Labor Management Relations Act and Section 8 of the National Labor Relations Act.

Section 4 of the Clayton Act, 15 U.S.C. Sec. 15, provides that a successful plaintiff prosecuting a Sherman Act claim shall be awarded treble the amount of his actual damages, plus his attorneys' fees; the trebling of the damage award is mandatory; *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 878 (7th Cir. 1970); *cert. denied*, 91 S.Ct. 582, 400 U.S. 1020. The treble damages provided under Section 4 are a form of punitive or exemplary damages, designed to deter further anticompetitive conduct; *Kline v. Coldwell Banker & Co.*, 508 F.2d 226, 235 (9th Cir. 1974).

By contrast, Section 301 of the LMRA, 29 U.S.C. §185, which provides the jurisdictional basis for the Union's second claim for relief, provides for no automatic award of punitive or exemplary damages; indeed, it has been found to permit exemplary damages only in extraordinary cases. See *Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO v. Michelson's Fruit Services, Inc.*, 545 F.2d 1248, 1254 (9th Cir. 1976); *Navios Corp. v. National Maritime Union of America*, 236 F. Supp. 657 (D.C. Pa. 1964); *aff'd.* 359 F.2d 853, *cert. denied*, 87 S.Ct. 205, 385 U.S. 900. Section 301 also does not permit an award of attorneys' fees. See *General Telephone Co. of the Northwest, Inc. v. International Brotherhood of Electrical Workers*, 554 F.2d 985, 987 (9th Cir. 1977).

Similarly, the NLRA does not make any provision for the award of punitive damages for unfair labor practices; indeed, the cases appear to have been unanimous in holding that the National Labor Relations Board's power is limited to the fashioning of "make whole" remedies; see *Republic Steel Corp. v. NLRB*, 311 U.S. 7,10-11, 61 S.Ct. 77 (1940); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198, 61 S.Ct. 845 (1941) ["only actual losses should be made good

. . ."]. The question of whether attorneys' fees may be awarded ordinarily does not arise in NLRB cases, because the Board, rather than the injured party, prosecutes the case; those few cases in which costs of litigation have been awarded have emphasized the extraordinary circumstances involved; see *Tiidee Products, Inc.*, 194 NLRB 1234, 1235-1237 (1970), *enforced*, 426 F.2d 1243 (D.C. Cir. 1970); *Metco, Inc.*, 205 NLRB 875 (1973), *enforced*, 496 F.2d 1342 (5th Cir. 1974).

Given the sharp divergence between the remedies available to a successful plaintiff under the Sherman Act and those available to a plaintiff under the federal labor laws, petitioner is at a loss to understand the Ninth Circuit's assertion that such remedies are "consistent" and that the Union should have a choice of theories on which to proceed.[10]

This Court has repeatedly emphasized the importance of preserving the intricate and delicate statutory scheme which Congress has advised for the regulation of labor relations. *See Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274,

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[10] A U.S. District Court has observed: "It is a commonplace that the antitrust laws and the labor laws are antithetical." *Consolidated Express, Inc. v. New York Shipping, Inc.*, 452 F. Supp. 1024, 1026 (D.C. N.J. 1978). One commentator has stated that antitrust policy and labor policy are "intrinsically incompatible." St. Antoine, "*Connell: Antitrust Law at the Expense of Labor Law*," 62 Va. L. Rev. 603, 604 (1976). Professor Cox has written: "No one seriously suggests that antitrust policy should be concerned with the labor market per se." "*Labor and the Antitrust Laws — A Preliminary Analysis*," 104 U. Pa. L. Rev. 252, 254 (1955).

91 S.Ct. 1909 (1971); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959).[11]

How, then, can a remedy designed to regulate commercial abuses in the marketing of goods and services be thrust into the midst of the federal labor relations mechanism without throwing that mechanism into disarray?

This Court has long recognized that state antitrust statutes may not be applied to regulate labor conduct which comes within the ambit of the National Labor Relations Act; see *Connell Construction Company, Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 636; 95 S.Ct. 1830, 1842 (1975). The same potential for a conflict exists between federal labor and federal antitrust laws if the lower courts fail to properly balance and reconcile the application of these laws. In *Connell*, this Court noted that the accommodation between federal labor and antitrust policy is "delicate." 421 U.S. at 636. The Ninth Circuit opinion in this case betrays no serious effort to consider the untoward consequences of applying a treble damage remedy in an area already intricately regulated by federal labor laws containing conflicting remedies and standards of conduct.

D. The Court Should Clarify the Scope of the Statutory Antitrust Exemption as It Applies to Employers.

Section 20 of the Clayton Act, 29 U.S.C. Sec. 52, provides:

> "In any case . . . between employers and employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment . . .

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[11] Petitioner recognizes, of course, that this Court has permitted common law remedies to be applied to claims arising in labor disputes which are "peripheral" to the concerns of federal labor law; see *Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745 (1978); *Farmer v. Carpenters*, 430 U.S. 290, 97 S.Ct. 1056 (1977); *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657 (1966). However, in this action, no such competing local interest is involved. Rather, the Union is attempting to utilize a federal remedy developed to regulate business competition to resolve a labor dispute which is a central focus of the National Labor Relations Act.

> ". . . no injunction shall prohibit any person or persons, whether singly or in concert, from . . . ceasing to . . . employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do . . . nor shall any of the acts specified in this paragraph be considered or held violations of any law of the United States."

The acts which the Ninth Circuit found potentially violative of the Sherman Act (the refusal to let subcontracts to unionized subcontractors, and the encouragement or "coercion" of others to do so) seem clearly to fall within the broad spectrum of acts immunized from legal action by Section 20 of the Clayton Act.

The Ninth Circuit, however, held that Section 20 could afford AGC and its members no protection, because such protection "would be totally inconsistent with the pro-labor purpose for which Section 20 was enacted." 648 F.2d at 533.

Other circuit courts and district courts have disagreed with this holding, finding that Section 20 does immunize concerted employer activity within the labor context; see *Local Union 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979); *Kennedy v. Long Island Railroad*, 319 F.2d 366, 372 (2d Cir. 1963), *cert. denied*, 375 U.S. 830 (1963); *Clune v. Publishers Association of New York City*, 214 F. Supp. 520, 528, *aff'd. mem.*, 314 F.2d 343 (2d Cir. 1963).[12]

In support of its assertion that Section 20 cannot protect concerted conduct of employers, the Ninth Circuit panel relies primarily upon *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 65 S.Ct. 1533 (1945).

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[12] Until the present case, the question was open in the Ninth Circuit; *Retail Clerks v. Alfred M. Lewis, Inc.*, 327 F.2d 442 (9th Cir. 1964).

Allen Bradley, however, did *not* involve unilateral concerted activity by employers in a collective bargaining context. Rather, *Allen Bradley* involved a combination of unions *and* employers in a broad conspiracy to fix prices and allocate markets in the New York City area. This Court held that the employers in *Allen Bradley* could not shield themselves from liability for these anticompetitive acts merely because unions participated in the illegal conduct. Nothing in the *Allen Bradley* opinion supports the Ninth Circuit's belief that the exemption of Section 20 is unavailable to employers' groups acting unilaterally in formulating and carrying out labor relations policies, and encouraging others to follow the same policies.

This Court has previously recognized that the *non*-statutory antitrust exemption provides shelter to both employers and unions from antitrust claims arising out of agreements relating to the elimination of competition over wages, hours and working conditions; see *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 85 S.Ct. 1596 (1965); *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, supra*. It would be anomalous if the statutory exemption did not have a similarly broad application.

Both the statutory and non-statutory exemptions implicitly recognize that there is a sphere of protected labor-related activity which must be controlled exclusively by federal labor law and must therefore be exempt from attack under federal antitrust law, state antitrust law, and common law tort doctrines. Otherwise, the balance between union and employer rights under federal labor laws would be thrown widely out of balance. Whenever a union felt that an employer's association and its members were acting improperly, it could resort to suit under the Sherman Act, if it became dissatisfied with the remedies provided by federal labor laws; by contrast, the employers would have no such remedy against the union, because of the union's broad exemption under Section 20 of the Clayton Act.

The Ninth Circuit recognized that all of the union's pendent claims, based on common law theories of tort and upon California antitrust law, were necessarily preempted, even though they might be "basically consistent with the aims of federal labor law." 648 F.2d at 540. Yet the circuit court seemed completely insensitive to the equally obvious proposition that federal antitrust laws, tailored to control anticompetitive activities in the market place, are a wholly inappropriate vehicle for regulating the relationship between unions and employers with which they have collective bargaining agreements.

E. The Ninth Circuit Has Unjustifiably Expanded the Class of Persons Entitled to Recover Damages for Violations of the Sherman Act.

Section 4 of the Clayton Act, 15 U.S.C. Sec. 15, provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble damages in an antitrust action brought in an appropriate federal court.

The literal language of this statute would provide a treble damage recovery to anyone who could prove any injury related to an antitrust violation. Recognizing the "endlessness and futility of the effort to follow every transaction to its ultimate result,[13] the courts have created standing doctrines designed to limit recovery under Section 4 to "those individuals whose protection is the fundamental purpose of the antitrust laws." *In Re Multi-District Vehicle Air Pollution, M.D.L. No. 31*, 481 F.2d 122, 125 (9th Cir. 1973).

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[13] *Southern Pacific Co. v. Darnell-Teanzer Lumber Co.*, 245 U.S. 531, 534, 38 S.Ct. 186 (1918) (Holmes, J.).

Though the circuit courts have adopted varying approaches to analyzing standing issues, they have nearly always attempted to place some reasonable limitation upon the class of persons entitled to sue. As this Court noted:

> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263, n. 14, 92 S.Ct. 885, 891-892 (1972).

There appear to have been three separate types of standing doctrines devised by the circuit courts: the "target area" approach, the "direct injury" test, and the "zone of interest" analysis.[14]

This Court has never given its express approval to any of the standing tests devised by the circuit courts of appeal to determine which parties may seek damages under Section 4 of the Clayton Act. The dicta quoted above from *Hawaii v. Standard Oil Co.*, however, seems to indicate that this Court recognizes and approves of the efforts of the circuit courts to limit the classes of persons who may recover damages for violations of the Sherman Act.

In the present action, the Ninth Circuit has approved the standing of the Union to seek damages on behalf of its members arising out of the members' lost wages as a result of the employers' deflection of subcontracts from unionized contractors to non-union employers.

In two prior cases, *Contreras v. Grower Shipper Vegetable Association,* 484 F.2d 1346 (9th Cir. 1973), *cert.*

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[14] *See generally*, the discussion of the "target area" and "direct injury" tests in *In Re Multi-District Vehicle Air Pollution, M.D.L.* No. 31, *supra*, 481 F.2d at 127-128. The "zone of interest" analysis is discussed by the Circuit opinion in this case; 648 F.2d at 538, n. 18-19.

denied, 415 U.S. 932 (1974) and *Gutierrez v. E & J Gallo Winery Co.*, 604 F.2d 645 (9th Cir. 1979), the Ninth Circuit rejected the proposition that employees of an injured employer could seek damages as a result of a dimunition in employment opportunities occasioned by an antitrust conspiracy.[15]

Without overruling either *Contreras* or *Gutierrez*, the Circuit panel in the present case has conferred standing upon the Union to seek damages on behalf of employees who suffer derivative injury because of their employer's loss of employment opportunities. It seems clear that under prior cases utilizing the "target area" approach, only the injured employers, and not their employees, would have standing to sue. The Ninth Circuit's departure from the previous target area analysis is unexplained.

It also seems clear that those circuits which employ the "direct injury" analysis would also preclude the employees from obtaining relief. See, *e.g.*, *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910). See also, *Vincel v. White Motor Corporation*, 521 F.2d 1113 (2d Cir. 1975), and *Ash v. International Business Machines, Inc.*, 353 F.2d 491 (3d Cir.), *cert. denied*, 384 U.S. 927, 86 S.Ct. 1446 (1975).

No case which has arisen under the "zone of interest" analysis has yet dealt with a situation such as that raised by this case. The Ninth Circuit's opinion suggests that it believes application of the "zone of interest" analysis would provide standing to injured employees. 648 F.2d at 538, n. 19.

Petitioner believes that this Court should intervene to make it clear that interests as remote as those represented by the employees of allegedly injured employers cannot appropriately be addressed in a Sherman Act suit brought by a Union representing a portion of such employees.[16]

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[15] *See also, Solinger v. A & M Records, Inc.*, 586 F.2d 1304, 1311 (9th Cir. 1978): "Shareholders, officers and employees of corporations are generally denied standing to sue."

Moreover, the Ninth Circuit has ignored the fundamental principle that a union or other voluntary organization is not an appropriate class representative to press individual damage claims of its members. See *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197 (1975); *Associated General Contractors v. Otter Tail Power Co.,* 611 F.2d 684 (8th Cir. 1979); *Cordova v. Bache & Co.,* 321 F. Supp. 600 (S.D.N.Y. 1970). This startling departure from established precedent is yet another reason why this Court should elect to hear this case.

VII.
CONCLUSION.

The Ninth Circuit opinion in the present case constitutes a radical departure from recognized doctrines of antitrust and labor laws. This case merits the review of this Court.

Respectfully submitted,
Cox, Castle & Nicholson,
James P. Watson,
George M. Cox,
Attorneys for Petitioner.

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[16] Although "analytically distinct" from the question of standing, this Court's refusal to permit indirect purchasers of commercial products to sue for damages under federal antitrust laws because of their remoteness from the initial impact of the injury is relevant. Stressing the problems of proof which arise in such a case, this Court refused to permit such indirect purchasers to seek relief under the Sherman Act in *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061 (1977). The same problems of proof which the Court foresaw in *Illinois Brick* would arise if the present action were permitted to proceed.

Appendix

I

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

3609/1451/1452
07/15/81

CALIFORNIA STATE COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, et al.,	No. 77-2323 DC No. CV 75-0260
Plaintiffs-Appellants,	
vs.	O P I N I O N
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., et al.,	
Defendants-Appellees.	

Appeal from the United States District
Court for the Northern District of
California

Hon. Robert F. Peckham, District Judge,
presiding

Argued and Submitted January 15, 1980

Before: SNEED, PREGERSON, and ALARCON,
Circuit Judges.

PREGERSON, Circuit Judge:

This is an appeal from an order of the district court granting defendants' motions to dismiss under Fed.R.Civ.P 12(b) (6) for failure to state a claim upon which relief can be granted.

Two carpenters' unions filed an antitrust action against a contractors' association for conspiracy to boycott union-signatory subcontractors. The complaints also charged breach of contract, various business torts, and violations of state antitrust laws. The district court granted the motion to dismiss on the ground that unions are barred from bringing antitrust actions "against an employer in the normal type of labor dispute." California State Council of Carpenters v. Associated General Contractors of California, Inc., 404 F.Supp. 1067, 1070 (N.D. Cal. 1975). We find that the district court erred in dismissing appellants' claim for relief under the Sherman Act. As to appellants' remaining claims, however, we affirm the district court's order of dismissal.

BACKGROUND

The California State Council of Carpenters is the collective bargaining agent for carpenters and their affiliated local unions with respect to master collective bargaining agreements governing the California carpentry industry. The Carpenters 46 County Conference Board is the collective bargaining agent for carpenters employed in the drywall industry. Together, these two unincorporated labor organizations ("Unions") filed a complaint in district court, on their own behalf and on behalf of their affiliated local unions and district councils.[1]

The complaint names as defendants the Associated General Contractors of California ("AGCC"), each of its individual members, and one thousand "Doe's" who are identified only as co-conspirators of the named defendants. The AGCC and the Unions have, for many years, entered into collective bargaining agreements. The complaint alleges, in essence, that, despite the existence of those agreements, members of the AGCC, an important construction industry employers' organization, conspired among themselves and with other industry employers to: (1) boycott union-signatory subcontractors, i.e., subcontractors who signed collective bargaining agreements with the Unions; (2) maintain non-union shops and divisions; and (3) breach their collective bargaining agreements with the Unions. The Unions claim this alleged conspiracy violated section 1 of the Sherman Act. The Unions further claim that, through this conspiracy, the AGCC breached its collective bargaining agreements with the Unions, violated California's antitrust statute,[2] and committed the torts of intentional interference with contractual relations and intentional interference with business relationships. The Unions allege antitrust damages of $25 million, to be trebled to $75 million.

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[1] The affiliated local unions and district councils, on whose behalf the Unions seek to bring this action as a class action, are listed in Appendix I infra.

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[2] The Cartwright Act, Cal. Bus. & Prof. Code Sections 16700, et seq.

In an order based largely on the Supreme Court's decision in Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 95 S.Ct. 1830 (1975), the district court dismissed the Unions' entire complaint. The court characterized the Unions' antitrust claim as charging that "defendants . . . declined to enter into agreement with plaintiffs to deal only with subcontractors which were signatories to contracts with plaintiffs . . . ." 404 F.Supp. at 1070. The district court then dismissed the antitrust claim on the basis of "Connell and the considerable body of case law declining to recognize an antitrust cause of action alleged by a union against an employer in the normal type of labor dispute." Id. As to the Unions' claims for breach of collective bargaining agreements, the court reasoned that such claims were subject to the agreements' mandatory arbitration provisions and that the Unions were therefore required to pursue those dispute resolution procedures first before challenging alleged violations in federal court. Finally, dismissal of the Unions' state law claims was premised on the doctrine of federal preemption.

On this appeal, the Unions dispute the position of the AGCC that its conduct is exempt from the antitrust laws by virtue of the labor exemption discussed in Connell. The Unions correctly state that Connell did not purport to exempt anti-union activities on the part of employers from the antitrust laws. On the contrary, Connell held that a union could be liable under the antitrust laws for coercing a "stranger" employer, i.e., one with whom the union had no collective bargaining relationship, to agree not to use non-union subcontractors. The Unions argue that the AGCC's alleged conduct in this case constitutes the "flip side" of Connell, viz., employers conspiring to coerce stranger employers, i.e., those with whom the Unions had no collective bargaining relationship, to agree not to use union-signatory subcontractors. The Unions therefore maintain that their complaint does, consistent with Connell, state a cause of action under the antitrust laws.

The AGCC argues that, while conspiracies involving both a union and an employer may give rise to antitrust violations, employer conspiracies directed against unions are not actionable under the Sherman Act. The AGCC also suggests that the Unions do not have standing to bring this action, even if the AGCC did violate the Sherman Act.[3] As to the Unions' breach of contract claims, the AGCC argues that the Unions should have first used contractual grievance procedures, and that their failure to do so rendered those claims vulnerable to dismissal.

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[3] This issue was not addressed in the district court's order of dismissal.

As to dismissal of their contract claims, the Unions suggest that proceedings on the contract issues should have been stayed, pending arbitration, rather than dismissed. The Unions also argue that their state law claims should not have been dismissed on the basis of federal preemption because those claims were based on conduct undertaken outside of the collective bargaining relationship, and therefore not exclusively governed by federal labor laws.

I. SHERMAN ACT CLAIM

Section 1 of the Sherman Act declares unlawful "every . . .

conspiracy, in restraint of trade or commerce." 15 U.S.C. Section 1. The Supreme Court has rejected the proposition that every arguable "restraint" falls within the scope of the Act and indicated that a showing of some form of restraint upon commercial competition in the "marketing of goods or services" is a prerequisite to the application of the Sherman Act. Apex Hosiery Co. v. Leader, 310 U.S. 469, 495, 60 S.Ct. 982, 993 (1940). See also Kennedy v. Long Island Railroad, 319 F.2d 366, 372-73 (2d Cir.), cert. denied, 375 U.S. 830 (1963); Prepmore Apparel, Inc. v. Amalgamated Clothing Workers, 431 F.2d 1004, 1007 (5th Cir. 1970), cert. dismissed, 404 U.S. 801, (1970).

In its published order, the district court mischaracterized the Union's antitrust claim as charging that "defendants . . . declined to enter into agreements with plaintiffs to deal only with subcontractors which were signatories to contracts with plaintiffs." 404 F.Supp. at 1070. Our reading of the first amended complaint does not reveal the basis for this characterization, nor can support for the district court's characterization otherwise be gleaned from the record. To accept the district court's characterization would thus require overstepping the boundaries of the complaint, which federal courts are precluded from doing when ruling on motions to dismiss. Fed.R.Civ.P. 12(b). See Walling v. Beverly Enterprises, 476 F.2d 393, 395 (9th Cir. 1973).

What the Unions' first amended complaint does allege is that the AGCC conspired to coerce "owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs."[4] The Unions also allege that members of the AGCC coerced and aided each other to subcontract only with subcontractors who had not signed with the Unions. The situation described by these allegations is very similar to a concerted refusal to deal, or a group boycott, which have both been held to constitute Sherman Act violations.[5]

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[4] First Amended Complaint, at 7.

[5] See, e.g., United States v. Women's Sportswear Mfg. Ass'n, 336 U.S.

(footnote 5 continued on next page)

In Connell, the defendant union picketed the plaintiff general contractor

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(footnote 5 continued from previous page)

460, 464, 69 S.Ct. 714, 716, 23 LRRM 2519 (1949), in which the inclusion in a collective bargaining agreement of a provision limiting work to union shops which were also members of a trade association was found to violate section 1 of the Sherman Act. ("The trial court found no evidence that the Union participated in making the agreement. And if it did, benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires."). See also American Medical Ass'n, v. United States, 317 U.S. 519, 63 S.Ct. 326 (1943) (attempt by a doctors' organization to induce hospitals not to deal with doctors who engaged in prepaid medicine plans violated section 3 of the Sherman Act); Fashion Originators' Guild v. FTC, 312 U.S. 457, 61 S.Ct. 703 (1941) (agreement among members of a group of dress designers and textile manufacturers to boycott and decline to sell their products to retailers who sold garments copied from designs put out by group members violated the antitrust laws); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 51 S.Ct. 42 (1930) (agreement by film distributors not to deal with any exhibitors who

(footnote 5 continued on next page)

to compel it to do business exclusively with plumbing and mechanical work subcontractors who had signed contracts with the defendant union. No collective bargaining relationship existed or was contemplated between the defendant union and the plaintiff general contractor. Indeed, the union had no interest in organizing the general contractor's

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refused to comply with a standard contract provision requiring arbitration of disputes violated section 1 of the Sherman Act); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), cert. denied sub nom. Western Int'l Hotels Co. v. United States, 409 U.S. 1125 (1973) (hotel operators, who organized an association to attract conventions to their city and who sought contributions for their association from hotel suppliers, violated section 1 of the Sherman Act by agreeing to give preferential treatment to suppliers who made contributions and to curtail purchases from those who did not).

own employees. To halt the picketing, the general contractor, under protest, finally signed the agreement demanded by the union to employ union signatory subcontractors exclusively. The general then brought suit alleging that the union's conduct violated sections 1 and 2 of the Sherman Act. The Supreme Court reversed the district court's finding, affirmed by the Fifth Circuit, that the union's conduct fell within labor's exemption from the antitrust laws, and remanded for consideration of the Sherman Act claims.

Writing for the Court, Justice Powell reasoned that if the union's conduct were held exempt from the antitrust laws, a more efficient nonunion subcontractor, paying wage rates and fringe benefits equal to or lower than those obtained by the defendant union, would be precluded from competing against union subcontractors for Connell's plumbing and mechanical work. Because such conduct could impose a direct restraint on the business market which would affect competition for goods and services in ways that would not follow naturally from elimination of competition over wages and working conditions, the union's conduct, the Court found, could be the basis of a federal antitrust suit. 421 U.S. at 635.

The Unions' allegations, contained in the first amended complaint, present virtually the obverse of the situation described in Connell. The AGCC allegedly sought to coerce owners of property, general contactors, and "other letters of construction contracts," with whom the Unions had no collective bargaining relationship, to hire only construction firms, primarily subcontractors, who had not signed with the Unions. Such conduct could well restrain competition since success in getting others to adhere to the conspiracy would effectively lock union-signatory subcontractors out of a portion of the market for carpentry work. More efficient subcontractors who had signed with the Unions and were paying wage rates and fringe benefits equal to or lower than those paid by nonunion subcontractors would be precluded from competing for carpentry work required by those who had not signed with the Unions. Thus, the rationale underlying Connell would seem to apply with at least equal force to this case. Absent a valid exemption from the antitrust laws, the employers' group here, like the union in Connell, may be found to have violated the Sherman Act.[6]

II. LABOR'S ANTITRUST EXEMPTIONS

Even if this alleged conduct violated section 1 of the Sherman Act, the AGCC argues that it could not be held liable for such a violation by virtue of labor's exemption from the antitrust laws. According to the Supreme Court in Connell, labor's exemption may be divided into two categories: (1) the statutory exemption, a product of several statutes, and (2) the nonstatutory exemption, based on "the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions . . . ." 421 U.S. at 621-622.

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[6] We note that the AGCC's alleged conduct, in addition to giving rise to antitrust liability, might also have provided a basis for unfair labor practice proceedings under sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (NLRA). In cases like this, however, "where there is an independent federal remedy that is consistent with the NLRA, the parties may have a choice of federal remedies." See Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 635 n.17, 95 S.Ct. 1830, 1841 n.17 (1975).

A. The Statutory Exemption

Labor's statutory exemption from the Sherman Act is embodied in sections 6 and 20 of the Clayton Act, 15 U.S.C. section 17 and 29 U.S.C. section 52; and sections 1 through 15 of the

Norris-LaGuardia Act, 29 U.S.C. Sections 101 to 115.

Section 6 of the Clayton Act, 15 U.S.C. Section 17, provides that labor unions are not unlawful, and that neither the unions nor their members may be considered illegal combinations or conspiracies in restraint of trade. Section 20 of the Clayton Act, 29 U.S.C. Section 52 and Section 4 of the Norris-LaGuardia Act, 29 U.S.C. Section 104, prohibit courts from issuing injunctions against certain specified activities arising from labor disputes.[7] Section 20 of the Clayton Act has also been construed to provide that conduct made non-enjoinable by the Clayton and Norris-LaGuardia Acts cannot be held to violate any federal law.[8] Thus, conduct made non-enjoinable by these acts is also exempt from the antitrust laws.

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[7] See Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622, 95 S.Ct. 1830, 1835 (1975) ("These statutes . . . exempt specific union activites, including secondary picketing and boycotts, from the operation of the antitrust laws").

Defendants here are a group of construction industry employers. The statutory exemptions from the antitrust laws found in the Clayton and Norris-LaGuardia Acts were, however, "designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining." Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad, 353 U.S. 30, 40, 77 S.Ct. 635, 640; (1957). See also Cordova v. Bache & Co., 321 F.Supp. 600, 605-06 (S.D.N.Y. 1970). Given the statutory exemption's pro-labor purpose, how does the AGCC, an employer's group, expect to benefit from the exemption?

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[8] According to the Supreme Court in United States v. Hutcheson, 312 U.S. 219, 231, 61 S.Ct. 463, 466 (1941), in determining "whether trade union conduct constitutes a violation of the Sherman Law . . . the Clayton Act and the Norris-LaGuardia Act (are to be read) as a harmonizing text of outlawry of labor conduct." Activities non-enjoinable under Norris-LaGuardia thus are protected from being made unlawful by virtue of section 20 of the Clayton Act, 29 U.S.C. section 52 ("nor shall any of the acts specified in this paragraph (as non-enjoinable) be considered or held to be violations of any law of the United States").

Although the AGCC appears to be claiming the statutory exemption, the AGCC fails to cite any specific statutory language in support of its claim. The only language that we have been able to find in the statutes that might conceivably benefit the AGCC is the following excerpt from section 20 of the Clayton Act:

> (1) in any case . . . between employers and employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment . . . .
>
> . . . no . . . injunction shall prohibit any person or persons, whether singly or in concert, from . . . ceasing to . . . employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do . . . nor shall any of

> the acts specified in this paragraph be considered or held to be violations of any law of the United States.

29 U.S.C. Section 52.

Under this section, the AGCC's alleged conduct might be characterized as merely "recommending . . . or persuading others" not to let contracts to union-signatory subcontractors thereby exempting the conduct from the operation of the Sherman Act. The AGCC cannot benefit from this statutory exemption, however, for two reasons: (1) the exemption has not been extended to anticompetitive conduct involving groups of businessmen, and (2) such an extension, exempting antiunion conduct on the part of business groups, would be totally inconsistent with the pro-labor purpose for which section 20 was enacted.

To be exempt from the antitrust laws, the conduct described in section 20 must arise out of "a dispute concerning terms or conditions of employment." The Clayton Act does not define the phrase "a dispute concerning terms or conditions of employment" used in section 20. For this reason, the broad definition of "labor dispute" found in section 13(c) of the Norris-LaGuardia Act, 29 U.S.C. section 113(c), has been read into section 20 on the ground that, in section 13(c), Congress defined its concept of "labor dispute" in terms that "no longer leave room for doubt." United States v. Hutcheson, 312 U.S. 219, 234, 61 S.Ct. 463, 467.[9] Section 13(c) of the Norris-LaGuardia Act defines "labor dispute" as "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." The

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[9] See also 312 U.S. at 231, 61 S.Ct. at 466. ("[The Norris-LaGuardia Act] established that the allowable area of union activity was not to be restricted, as it had been in the Duplex case [Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S.Ct. 172 (1921)], to an immediate employer-employee relation. Therefore, whether . . . conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and section 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.").

AGCC's alleged conspiracy to persuade others not to deal with subcontractors who signed with the Unions, might be said to fall within section 13(c)'s broad definition of labor dispute, as either a dispute "concerning terms or conditions of employment" or one "concerning the association or representation of persons in negotiating . . . terms or conditions of employment." The Supreme Court, however, has refused to apply section 20 to exempt anticompetitive conduct involving employer groups, even though the conduct, which also involved labor unions, might have been said to arise out of a "labor dispute" as defined in the Norris-LaGuardia Act. In Allen Bradley Co. v. Local 3, Int'l Brotherhood of Electrical Workers, 325 U.S. 797, 65 S.Ct. 1533 (1945), the court held that a union and an employer group that conspired to restrain trade were guilty of violating the antitrust laws even though the conspiracy developed from a labor dispute between the union and the employer group. Although the court noted that the union's conduct fell squarely within the "specified acts" declared by the Clayton and Norris-LaGuardia Acts not to be violations of federal law, 325 U.S. at 807, 65 S.Ct. at 1538-1539, the Court declared that the purpose of the antitrust laws was to outlaw business monopolies and that "(a) business monopoly is no less such because a union participates . . . ." Id. at 811.[10] The court futher explained that:

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[10] See also Los Angeles Meat & Provision Drivers Union Local 626

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The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly. It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aid

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v. United States, 371 U.S. 94, 99-100, 83 S.Ct. 162, 165 (1962) ("It is . . . beyond question that nothing in the anti-injunction provisions of the Norris-LaGuardia Act, nor in the labor exemption provisions of the Clayton Act, insulates a combination in illegal restraint of trade between businessmen and a labor union from the sanctions of the antitrust laws". (footnotes and citations omitted).

> business groups to frustrate its primary objective. For if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves.

325 U.S. at 809-810, 65 S.Ct. at 1540.

To summarize: In the context of a labor dispute, section 20 of the Clayton Act and section 4 of the Norris-LaGuardia Act, which were primarily designed to promote labor orgainzation, exempt from the antitrust laws anti-competitive conduct on the part of labor unions acting alone. The statutory exemption embodied in those acts has not, however, been extended to immunize anticompetitive conduct involving unions and business men acting together, even where such conduct might promote labor organization, because such an extension would effectively negate the prohibitions against anticompetitive business conduct contained in the antitrust laws. *A fortiori*, if the statutory exemption is inapplicable to business group conspiracies involving unions, the exemption cannot be read to immunize anticompetitive conduct on the part of employers acting alone.

In *United States v. United Mine Workers of America*, 330 U.S. 258, 67

S.Ct. 677 (1947), the Court also explained that since the restrictions on injunctions found in the Clayton Act are less comprehensive than those found in the later-enacted Norris-LaGuardia Act, the Clayton Act does not deprive federal courts of jurisdiction to grant injunctive relief in any case in which they are not specifically deprived of such jurisdiction under the Norris-LaGuardia Act.[11]

In short, the Norris-LaGuardia Act

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[11] See United States v. United Mine Workers of America, 330 U.S. 258, 269-271, 67 S.Ct. 677, 684-685 (1947). (Moreover, it seems never to have been suggested that the proscription on injunctions found in the Clayton Act is in any respect broader than that in the Norris-LaGuardia Act . . . . This Court, on the contrary, has stated that the Norris-LaGuardia Act 'still further . . . [narrowed] the circumstances under which the federal courts could grant injunctions in labor

(footnote 11 continued on next page)

limits the injunctive powers of federal courts to a greater extent than does the Clayton Act, rendering superfluous the Clayton Act's limits on the injunction powers of federal courts' and the concomitant limits on the scope of the statutory exemption.

The situations in which federal courts are deprived of jurisdiction to issue injunctions in labor disputes under

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disputes.' Consequently, we would feel justified in this case to consider the application of the Norris-LaGuardia Act alone. If it does not apply, neither does the less comprehensive proscription of the Clayton Act; if it does, defendant's reliance on the Clayton Act is unnecessary.) (footnotes and citations omitted). See also United States v. Hutcheson, 312 U.S. 219, 61 S.Ct. 463 (1941).

the Norris-LaGuardia Act are listed in the footnote.[12] Since the AGCC's

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[12] No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization . . .;

(c) Paying or giving to, or withholding from any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

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alleged conduct does not fit within any of the categories therein listed, such conduct is not non-enjoinable and therefore the AGCC may not claim the

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> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
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> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
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> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . .

29 U.S.C. Section 104.

benefit of the statutory antitrust exemption.[13]

Our determination that the AGCC cannot benefit from the statutory exemption embodied in the Norris-LaGuardia Act and section 20 of the Clayton Act is further supported by the purposes for which those acts were passed. Before the passage of those acts, employers frequently sought injuctions to frustrate labor unions' organizational drives. That the limitations on the federal injunctive power embodied in these acts were designed primarily to promote the organization of labor unions is well illustrated by the policy statement found in section 2 of the Norris-LaGuardia Act:

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[13] See also Group Life & Health Ins. v. Royal Drug Co., 99 S.Ct. 1067, 1083 (1979) ("It is well settled that exemptions from the antitrust laws are to be narrowly construed.").

> Whereas under prevailing economic conditions, . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing . . . and that he shall be free from the interference, restraint, or coercion

> of employers of labor, or their agents, in the designation of such representatives or in self-organization . . .; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. section 102. Thus the statutory exemption may not be construed to exempt a conspiracy of employers to destroy a particular union through a boycott of union-signatory subcontractors because such conduct is completely antagonistic to the pro-labor purposes for which the acts containing the labor exemption were enacted.

B. The Nonstatutory Exemption

In Connell, the Court explained that some of its earlier decisions, e.g., Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 85 S.Ct. 1596 (1965), created what the Court referred to as a limited "nonstatutory" exemption from antitrust sanctions for some union-employer agreements. 421 U.S. at 622, 95 S.Ct. at 1835. This exemption "has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions," and promotes "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA (National Labor Relations Act) and the congressional policy favoring free competition in business markets . . . ." Id.

It is apparent from the discussion in Connell that the nonstatutory exemption may be invoked only in cases involving agreements between unions and employers on wages or working conditions. The AGCC therefore cannot claim the exemption because its alleged conduct neither involved an agreement with a union nor confined itself to matters involving wages or working conditions. See Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

III. STANDING

The Unions filed their complaint as a class action under Fed.R. Civ.P.23(a), on behalf of their affiliated local unions and district councils.[14] The AGCC claims that the Unions lack standing to bring the action "on behalf of" their affiliated locals because they failed to allege two of the prerequisites to maintenance of a class action under Fed.R.Civ.P. 23(a): (1) that the Unions' claims are typical of the class, and (2) that the Unions can fairly and adequately represent the members of the class.

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[14] The entire list of class members, the Unions' affiliated locals and district councils, is contained in Appendix I infra.

Since the district court did not address the sufficiency of the class action allegations when it dismissed the complaint, that question will be deferred to the district court on remand. In this opinion, for purposes of determining whether dismissal was appropriate, we need only address the issue of whether, based on the defendants' alleged conduct, persons in the position of the Unions below would have standing to bring an action under the antitrust laws.

The statutory basis for private antitrust damage actions is section 4 of the Clayton Act, 15 U.S.C. section 15. That section confers the right to sue for treble damages on "(a)ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." On its face, this language seems to grant a private right of action to anyone who can prove "factual causation," i.e., that an injury to his "business or property" was caused by an antitrust violation. _See_ _In re Multidistrict Vehicle Air Pollution MDL No. 31_, 481 F.2d 122, 125 (9th Cir.) (Ely, J.), _cert._ _denied_, 414 U.S. 1045 (1973); _Bookout v. Schine Chain Theatres, Inc._, 253 F.2d 292, 295 (2d Cir. 1958) (L. Hand, J.). Concern that section 4 not become a vehicle for unreasonable damage awards, however, has led courts of appeal and district courts to hold that, to have standing to sue under the antitrust laws, plaintiffs must show not only factual causation but also "legal causation," i.e., that the injury caused was of the type the antitrust laws were intended to prevent.[15]

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[15] This judicially-created standing obstacle is based on the phrase "by reason of" in section 4. See Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073, 1076 (9th Cir. 1970), cert. denied, 402 U.S. 923 (1971); Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L.J. 809, 811 (1977).

It is not at all clear that the Supreme Court will ultimately accept these standing limitations. In Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660, 81 S.Ct. 365, 367 (1961), the court said that a treble damage plaintiff need show no more than that there was a violation and that plaintiff was injured. The Court has also stated that the lower courts should "not add requirements to burden the private litigant beyond what is specifically set forth" in the statutes. Radovich v. NFL, 352 U.S. 445, 454, 77 S. Ct. 390, 395 (1957). But see Hawaii v. Standard Oil Co., 405 U.S. 251, 262 n.14, 92 S.Ct. 885, 891 n.14 (1973) (dicta) ("[l]ower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.")

The Unions have met the factual causation requirement by alleging that, due to the AGCC's conspiracy to establish an industry-wide boycott against all subcontractors with whom the Unions had signed agreements, the Unions have been injured in their business, i.e., organizing carpentry industry employees, negotiating and policing collective bargaining agreements, and securing jobs for their members. What remains to be determined is whether the Union's claim meets the additional requirement of legal causation.

Various tests have been formulated to determine whether legal causation has been established. In some circuits, a plaintiff's claim is judged under the "direct injury" rule. This rule permits private actions to be maintained only by those whose injury is considered to be a "direct" or "proximate" result of prohibited anticompetitive activity. See Berger & Bernstein, supra note 15, at 813. Courts adhering to this test focus on the relationship between the alleged antitrust violator and the claimant. Generally, if the claimant is separated from the violator by one or more intermediate tiers of victims, standing is denied by attaching conclusory labels such as "remote," "indirect," and "consequential."[16]

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[16] See In re Multidistrict Vehicle Air Pollution MDL No. 31, 481 F.2d at 127; 13 J.O. von Kalinowski, ANTITRUST LAWS AND TRADE REGULATION section 101.02 (2) (a) (1980). See, e.g., Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970),

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This test has been criticized for engendering a tendency to deny standing to a plaintiff who happens to fall within certain "talismanic rubrics" (such as "creditor," "landlord," and "shareholder"), and for arbitrarily foreclosing otherwise meritorious claims simply because another antitrust victim interfaces the relationship between the claimant and the alleged violator. See In re Multidistrict Vehicle Air Pollution MDL No. 31, 481 F.2d at 127.

In this circuit, legal causation has traditionally been judged under

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cert. denied, 401 U.S. 923 (1971); Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395 (6th Cir. 1962), cert. denied, 372 U.S. (1963).

the so-called "target area" test. Under this test, a plaintiff is said to have standing to sue under the antitrust laws if he was "within the target area of the illegal practices," and "was not only hit, but aimed at." See Karseal v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955). The "target area" has been described as "that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[17] Put another way, private antitrust plaintiffs have standing if they are "within the area of the economy which (defendants) reasonably could have or did foresee would be endangered by the breakdown of competitive conditions." _In re Western Liquid Asphalt Cases_, 487 F.2d 191, 199 (9th Cir. 1973), _cert. denied_, 415 U.S. 919 (1974). _See also Blankenship v. Hearst Corp._, 519 F.2d 418, 425-26 (9th Cir. 1975).[18]

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[17] See, e.g., In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d at 129; Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073 (9th Cir. 1970), cert. denied, 402 U.S. 923 (1971); Conference of Studio Unions v. Loew's Inc., 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952).

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[18] Two other circuits, seeking a more flexible approach for judging whether a particular person is the proper party to litigate an antitrust claim, have recently adopted a "zone of interests" test. _See Bravman v. Bassett Furniture Indus., Inc._, 552 F.2d 90, 99 (3d Cir.), _cert. denied_, 434 U.S. 823 (1977); _Cromar Co. v. Nuclear Materials & Equip. Corp._, 543 F.2d 501, 505-08 (3d Cir. 1976); _Malamud v. Sinclair Oil Corp._, 521 F.2d 1142, 1148 (6th Cir. 1975).

According to the court in _Malamud v. Sinclair Oil_, both the direct injury test and the target area test

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Based on the facts alleged in the complaint, injury to the Unions' business was more than merely a "foreseeable consequence" of the AGCC's boycott of union-signatory subcontractors--it was the intended result. Under the target area test then, the Unions' complaint satisfies the legal causation

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"demand too much from plaintiffs at the pleading stage of the case." 521 F.2d at 1149. Inspired by the test for standing in administrative law, i.e., "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statutory or constitutional guarantee in question," the new test recognizes the inadequacy of any one formula and instead relies on a case-by-case determination of whether the plaintiff is one whom Congress intended to protect in enacting the antitrust laws. As applied by the Third Circuit, each case:

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requirement for standing. Moreover, our holding, that a union may have standing to sue an employers' group for conspiring to injure the union by eliminating companies that employ the union's members from the service market, conforms with several recent decisions in which employee groups have been permitted to

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> (M)ust be carefully analyzed in terms of the particular factual matrix presented. In making this factual determination courts must look to, among other factors, the nature of the industry in which the alleged antitrust violation exists, the relationship of the plaintiff to the alleged effect of the antitrust violation upon the plaintiff. Then, while recognizing that breaches of the antitrust laws have effects throughout society, a court must decide whether this

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maintain private antitrust actions on the ground that they were within the target area of the defendant's antitrust

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> plaintiff is one "whose protection is the fundamental purpose of the antitrust laws."
>
> Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d at 506.

This circuit has not previously commented on the zone of interests approach. See Solinger v. A&M Records, Inc., 586 F.2d 1304, 1310 n.5 (9th Cir. 1978), cert. denied, 99 S.Ct. 1999 (1979). We note with approval, however, that the zone of interests approach appears to embody a fundamental concern for the policies underlying the antitrust laws and Congress's purpose in creating a private antitrust damage action. That purpose appears to have been twofold: (1) to provide a meaningful compensatory remedy for private harm and (2) to provide effective enforcement and deterrence by encouraging private parties to bring some of the suits not brought by the

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activities.[19] *See*, *e.g.*, *Hennessey v. National Collegiate Athletic Ass'n*,

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government. *See* Berger & Bernstein, *supra* note 15, at 854-858. We therefore suggest that, in future cases, parties who would be denied standing because they were not "foreseeable victims" under the traditional target area test should still be permitted to litigate their claims if to do so would further the policies underlying the antitrust laws.

In the analogous field of tort law, in which a defendant who acts with intent to injure another is liable for unforeseen injury to third parties, forseeability is irrelevant to standing. Since section 4 of the Clayton Act is a remedial statute, designed to compensate victims of illegal acts that are inherently intentional rather than negligent, the systematic denial of standing on foreseeability grounds may result in the dismissal of actions which would otherwis further both the deterrent and compensation purposes of the Act. See footnote 19 *infra*.

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[19] The seemingly contrary holding of *Contreras v. Grower Shipper*

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564 F.2d 1136, 1147-1148 (5th Cir. 1977); Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1176-77, 92 LRRM 3351 (5th Cir. 1976) ("Unions are in the business of representing employees. If their ability to organize workers is injured by a conspiracy involving employers, the

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Vegetable Ass'n of Central California, 484 F.2d 1346 (9th Cir. 1973), cert. denied, 415 U.S. 932 (1974) (per curiam) is distinguishable. In that case farmworker employees were denied standing to sue for loss of work due to an alleged grower conspiracy to fix the price of iceberg lettuce by limiting production and sale of the lettuce. Loss of work, however, was not the intended result of the alleged conspiracy, but only one of its many incidental byproducts. Nor did the farmworkers in Contreras claim to have been totally shut out of the service market, as was the alleged intention of the conspiracy in the instant case. See also Gutierrez v. E. & J. Gallo Winery Co., 604 F.2d 645 (9th Cir. 1979) (per curiam).

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union's ability to attract membership and represent employees is weakened . . . . [The union's] allegations that Tugboat

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With reference to the discussion of the zone of injury test in footnote 18 supra, we note that Contreras and Gutierrez may be good examples of cases in which injury to a certain plaintiff might not have been foreseeable, but where that plaintiff's suit may further both the compensatory and deterrent purposes of the antitrust laws. Certainly an alleged conspiracy to limit lettuce production artificially could result in injury, whether intended or not, to persons who are highly dependent on that industry. Moreover, it may be that the farmworkers are the only persons available to bring suit. Companies whose business interests are immediately affected by an antitrust violation may not sue because of their stake in an ongoing commercial relationship with the violator. And even if the farmworkers' suit is not necessary to provide a deterrent, because of the availability of other injured parties, any fear of a duplicative or windfall recovery may be allayed by apportionment of damages at time of trial. See Berger & Bernstein, supra note 15 at 858-883.

conspired . . . to reduce labor costs by preventing [the union] from providing or representing Tugboat's employees is aimed as much at those parties as it is at (their employer)."); International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n, 483 F.2d 384, 397-98 (3d Cir. 1973), amended, 494 F.2d 1353 (3d Cir. 1974); Robertson v. National Basketball Ass'n, 389 F.Supp. 867, 884-89 (S.D.N.Y. 1975). See also Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390 (1957) (football players permitted to sue the NFL and its member teams to remedy an alleged boycott).

IV. BREACH OF CONTRACT CLAIMS

In their first amended complaint, the Unions alleged the following breaches of the collective bargaining agreement: (1) failure to pay agreed-upon wages, (2) failure to use the hiring hall, (3) failure to pay trust fund contributions, (4) failure to observe "other" terms and conditions of employment, and (5) "generally weakening the good-faith requirement of the collective bargaining agreements."

In their briefs, both sides indicate that the proper way to proceed on these claims, in the first instance, was through the grievance procedures created by the broad arbitration clauses found in the applicable collective bargaining agreements. The sole issue still in dispute as to these claims for breach of collective bargaining agreements is whether the claims should have been stayed pending arbitration rather than dismissed.

A review of both the cases cited by the parties and the recent decision of this court in Levya v. Certified Grocers of California, 593 F.2d 857, 101 LRRM 2101 (9th Cir.), *cert. denied*, 100 S.Ct.51, 102 LRRM 2360 (1979), indicates that, as to breach of contract claims prematurely filed in federal court, a district court may, under general equitable principles, decide that circumstances justify issuing a stay pending arbitration rather than dismissal.[20] We are aware of no case, however, which would support the proposition that a district court _must_ order a stay rather than dismissal at the request of the party responsible for prematurely filing the arbitrable claim in federal court. Moreover, the Unions have asserted no special circumstances, such as statute of limitations concerns or bad faith conduct by the opposing side in failing to make timely assertion of the applicability of the arbitration clause, which might, in some cases, be found to justify reversal of a lower court's denial of a stay. We therefore affirm the trial court's denial of a stay pending arbitration on the Unions' claims for breach of collective bargaining agreements.

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[20] _See, e.g., Mason-Dixon Lines, Inc. v. Local 560, Int'l Brotherhood of Teamsters_, 443 F.2d 807, 809 (3d Cir. 1971) ("a stay of proceeding pending arbitration . . . is within the inherent power of a (district) court").

V. CLAIMS BASED ON STATE LAW

The Supreme Court has adopted a broad rule of federal preemption under the labor laws, requiring preemption not only of laws which might interfere with federally protected activities, but also preempting many state remedies which are basically consistent with the aims of federal labor law. _See_ R. Gorman, _Labor Law_ 766-770 (West 1976).

A few state tort remedies, for conduct marked by violence and imminent threat to the public order, have been allowed to supplement remedies provided by federal law on the ground that the state remedies represent a compelling state interest. See San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247-48, 79 S.Ct. 773, 781 (1959). State remedies for non-violent business-related torts, however, are preempted by federal law, since most such claims are based on conduct capable of being characterized as unfair labor practices, which are within the National Labor Relations Board's primary jurisdiction under the NLRA, 29 U.S.C. Section 160. See Garner v. Teamsters Local 776, 346 U.S. 485, 74 S.Ct. 161 (1953). The district court therefore properly dismissed the Unions' tort claims for intentional interference with business and contractual relations.

The Unions' remaining state law claim was based on a California antitrust statute.[21] The Court in Connell held that the use of state antitrust law to regulate union activities in aid of organization must be preempted because it creates a substantial risk of conflict with policies central to federal labor law. 421 U.S. at 637, 95 S.Ct. at 1842. Although the Court's holding in Connell was limited to union organizational activities, the Court's reasoning for holding that application of state antitrust law was preempted is equally applicable to the Unions' claim in this case:

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[21] The Cartwright Act, Cal. Bus. & Prof. Code sections 16700, et seq.

> (T)he accommodation between federal labor and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with . . . labor policy . . . not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves . . . . State antitrust laws generally have not been subjected to this process of

> accommodation . . . Permitting state antitrust law to operate in this field could frustrate the basic federal policies.

Id.

CONCLUSION

The Union's allegation, in essence, that defendants conspired to boycott subcontractors who signed with the plaintiff Unions, states a claim for relief under section 1 of the Sherman Act for conspiracy in restraint of trade. Since the defendants' alleged conduct is not exempt from antitrust liability under either the statutory or nonstatutory labor exemption, the district court's dismissal of the Unions' federal antitrust claim is reversed. The district court's refusal to order a stay of proceedings, pending arbitration on the Unions' claims for breach of the collective bargaining agreement, was not improper, and is therefore affirmed. The dismissal of the Unions' business tort and state antitrust law claims, based on the doctrine of federal preemption, is also affirmed.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX I

1. Bay Counties District Council, and Local Unions Nos. 22, 34, 35, 36, 42, 102, 162, 194, 478, 483, 550, 642, 848, 1068, 1149, 1158, 1408, 1473, 1622, 1861, 2046, 2095, 2164, 2565, and 3116.

2. Central California District Council, and Local Unions Nos. 1959, 2559, 2561, 2652, 2687, 2688-S, 2707-S, 2728-S, 2749-S, 2762-S, 2801, 2838-S, 2927-S, 3088 3170-S, 2882, and 3184-S.

3. Delta-Yosemite District Council, and Local Unions Nos. 266, 386, 1235, 1418, and 1869.

4. Golden Empire District Council, and Local Unions Nos. 1240, 1254, 1495, 1599, 1970, and 2043.

Dissenting Opinion

SNEED, Circuit Judge, dissenting:

I respectfully dissent.

The proper disposition of this case turns on what is the proper characterization of the plaintiffs' complaint. The majority characterize it as alleging an agreement "to coerce owners of property, general contractors, and 'other letters of construction contracts,' with whom the Unions had no collective bargaining relationship, to hire only construction firms, primarily subcontractors, who had not signed with the Unions." When so characterized the majority concludes that the "flip side" or obverse of Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 95 S.Ct. 1830, 89 LRRM 2401 (1975), compels the conclusion that an antitrust cause of action was properly alleged by the complaint.

It is my view that the majority has mischaracterized the complaint. The district court's characterization was proper. The pertinent portion of its Memorandum and Order in which the proper characterization appears is set forth is as follows:

In the present case, the plaintiff unions claim that defendants have violated the antitrust laws by conspiring among themselves to deter plaintiff unions from organizing the subcontractors with whom the defendant contractors deal. The essence of plaintiffs' claim seems to be that defendants violated the antitrust law insofar as they declined to enter into agreements with plaintiffs to deal only with subcontractors which were signatories to contracts with plaintiffs, precisely the type of agreement which subjected the union in Connell to antitrust liability. Defendant employers are accused of conspiring in certain activities which would not have a "potential for restraining competition in the business market in ways that would not have a "potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." Connell, supra, 421 U.S. 635, 95 S.Ct. at 1841, 44 L.Ed.2d at 433. Consequently, in light of the explicit holding and discussion in Connell and the considerable body of case law declining to recognize an antitrust cause of action

> alleged by a union against an employer in the normal type of labor dispute, plaintiffs' first cause of action under the antitrust laws must be dismissed. (Italics added.)

California State Council of Carpenters v. Associated General Contractors, 404 F.Supp. 1067, 1070 (N.D. Cal. 1975).

This characterization makes clear that, rather than being the "flip side" of Connell, the antitrust allegations of the complaint set forth a claim which, if sustained by proof, would permit unions to achieve precisely what Connell prohibited. That is, employers with whom plaintiffs have no collective bargaining relationship will be eliminated from the relevant market with the resulting impairment of competition. This will come about not because of an agreement by employers with the plaintiffs of the type condemned by Connell, but because the now real threat of antitrust liability will divert virtually all subcontracting to employers having a collective bargaining relationship with the plaintiffs. Those with a taste for irony will no doubt savor the spectacle of Connell self-destructing.

The relevant portions of the plaintiffs' first amended complaint are set forth in the margin.[1] Even if it were conceded that the district court's characterization is unduly narrow, it does not follow that the complaint sets forth a cause of action under the antitrust law. The plaintiffs complain about various actions by the defendants that injure them. Their basic injury, as they allege it, is impairment of their ability to represent a greater portion of

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[1] XXIV

1. Pursuant to said plan, scheme, agreement and conspiracy, defendants and each of them have knowingly, willfully and maliciously committed the following acts:

(1) Changed names and corporate status without reason, and as a part of the above described plan, agreement, scheme, and conspiracy, in a fraudulent manner;

(footnote 1 continued on next page)

the workers in the construction industry. The injury, therefore, is to the plaintiffs' organizational and representational efforts. An injury of this type without more is not within the ambit of the antitrust law. Lacking is the restraint upon commercial competition in the marketing of goods and services. See Apex Hosiery Co. v. Leader, 310 U.S. 469,

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(footnote 1 continued from previous page)

> (2) Created and maintained double-breasted contracting situations, in which contractors have established and maintained union and non-union divisions, departments, and/or other such entities;
>
> (3) Advocated, encouraged, induced, and aided non-members of defendant Associated General Contractors of California, Inc. to refuse to enter into collective bargaining relationships with plaintiffs and each of them;

(footnote 1 continued on next page)

497 (1940); Clothing & Textile Workers v. J. P. Stevens & Co., 475 F.Supp. 482 (S.D.N.Y. 1979). Injuries to a union's organizational and representational efforts must be redressed pursuant to the terms of the National Labor Relations Act. 29 U.S.C. section 151 (1976). See Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); San Diego Building Trades Council v. Garmon, 359 U.S. 236

(footnote 1 continued from previous page)

> (4) Advocated, encouraged, induced, and coerced, aided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs and each of them;

(footnote 1 continued on next page)

(1959). Whether the Act provides a sufficient remedy is simply not relevant.

(footnote 1 continued from previous page)

(5) Advocated, induced, coerced, encouraged, and aided members of Associated General Contractors of California, Inc., non-members of Associated General Contractors of California, Inc., and "memorandum contractors" to enter into subcontracting agreements with subcontractors who are not signatories to any collective bargaining agreements with plaintiffs and each of them;

(6) Held open-shop meetings for members of defendant Associated General Contractors of California, Inc. and non-members, where said members and non-members were induced, encouraged, coerced, and aided to maintain non-union shops, double-breasted operations, and to do and complete all of the activities described herein. These non-members referred to in this subparagraph were both memorandum contractors and non-memorandum contractors.

(footnote 1 continued on next page)

the plaintiffs cannot be assumed to constitute an economically significant injury in view of the economic realities of employer-employee relations. Employers without collective bargaining agreements with the plaintiffs may make more profit than those who have such agreements. Their absence from this lawsuit constitutes some eveidence of their evaluation of their "injury." To the extent they are injured, the

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(footnote 1 continued from previous page)

> (7) Breached the collective bargaining agreements between defendants and each of them and plaintiffs and each of them, by failing to pay agreed-upon wages, by failing to use the hiring hall, by failing to pay Trust Fund contributions, by failing to observe other terms and conditions of employment, and by generally weakening the good-faith requirement of the collective bargaining agreements.

injury resembles that suffered by Brer Rabbit when, against his spurious entreaties to be spared such a fate, he was hurled into the briar patch by Brer Fox. Harris, How Mr. Rabbit Was Too Sharp For Mr. Fox, Uncle Remus (Frost ed. 1921). The absence from this suit of these uninjured employers leaves only the plaintiffs' complaint about the alleged injury to their organizational and representational efforts. This is an injury only congnizable under the labor laws.

The majority also construes the complaint to allege a boycott of employers which have collective bargaining relationships with the plaintiffs. Here a significant injury to the employers is properly alleged. But this construction of the complaint raises a standing problem. As the majority point out, "In this circuit, legal causation has traditionally been judged under the so-called target area test." Under the two-step analysis required by this test, the employers which are directly harmed by the alleged boycott have standing to sue under the Sherman Act. According to the majority so also do the plaintiffs. Under the "target area test," as employed by the majority, both have standing. This is an anomalous result. Instantly it raises the possibility of standing for antitrust purposes of employees, whether unionized or not, whose employer is injured in his business by an unlawful conspiracy. No doubt the employer's injury also hurts his employees. But this court has never permitted a reading of the target area test that would allow the employees of the victim of a boycott to bring an antitrust damage action in the victim's place. *Gutierrez v. E. & J. Gallo Winery Co.*, 604 F.2d 645 (9th Cir. 1979); *Contreras v. Grower Shipper Vegetable Association*, 484 F.2d 1346 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *see Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *Karseal Corp. v. Richfield Oil Corp*. 221 F.2d 358 (9th Cir. 1955); *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

However, even if standing might be accorded the plaintiffs on the basis of such cases as Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976), and International Association of Heat and Frost Insulators v. United Contractors Association, 483 F.2d 384 (3d Cir. 1973), amended, 494 F.2d 1353 (3d Cir. 1974), the essential injury remains one to their organizational and representational ability. Where that is the case labor law provides the comprehensive regulatory scheme sufficient to require that it be treated as having preempted antitrust law. See Clothing & Textile Workers v. J. P. Stevens & Co., supra.

When all is said and done, this is a labor case wearing an antitrust costume and inspired no doubt by the employer victory in Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra. It should remain a labor case. I would affirm.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CALIFORNIA STATE COUNCIL OF   )
CARPENTERS, UNITED            ) No. 77-2323
BROTHERHOOD OF CARPENTERS     )
AND JOINERS OF AMERICA,       ) ORDER
AFL-CIO, et al.,              )
                              )
      Plaintiffs-Appellants,  )
                              )
        vs.                   )
                              )
ASSOCIATED GENERAL            )
CONTRACTORS OF CALIFORNIA,    )
INC., et al.,                 )
                              )
      Defendants-Appellees.   )
______________________________)
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Before: SNEED, PREGERSON, and ALARCON, Circuit Judges.

An active judge of this court requested a vote on the appellant's suggestion for en banc consideration of this court's opinion, filed herein on November 20, 1980. The required vote has been taken, but failed to attain a majority of the active judges of the court. Accordingly, the petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

The Associated General Contractors, in their petition for rehearing en banc, suggested that "The present opinion of the panel could be read as disapproving multi-employer bargaining entirely." To eliminate the possibility that anyone else might read the opinion as rendering multiemployer bargaining or multiemployer bargaining units unlawful, the following explanation is intended to make it clear that California State Council did not, and indeed could not, have that effect.

To begin with, there is a vital difference between an agreement designed to promote collective bargaining, and a conspiracy aimed at destroying the collective bargaining process by locking unionized subcontractors out of the subcontracting market. Multiemployer bargaining has long had the approval of both the NLRB and the Supreme Court. See NLRB v. Truck Drivers Local 449 ("Buffalo Linen"), 353 U.S. 87 (1957); R. Gorman, Labor Law Section 6 at 87 (1976). The NLRB rules permit multiemployer bargaining units if all parties, union and employer, consent or agree to bargain on a multiemployer basis. NLRB, Twenty-Third Annual Report 36 (1958); 4 T. Kheel, Labor Law Section 14.03(4)(b) (1979). Such consent or agreement will normally be demonstrated by a substantial history of collective bargaining on that basis. Id.; R. Gorman, supra. The certification of a multiemployer bargaining unit therefore involves more than just an agreement among employers--it also requires the consent or agreement of the unions and the approval of the NLRB.

In California State Council, the union did not claim that it was somehow injured by the formation of multiemployer bargaining units. Indeed, as the complaint stated, the union collectively bargained with the AGCC, a multiemployer bargaining unit, for nearly twenty years. On the contrary, what was alleged in California State Council was that the AGCC conspired to coerce employers with whom the union had no collective bargaining relationship to agree not to hire subcontractors who had signed with the union. It was on the basis of this conduct, the equivalent of a group boycott and the obverse of the union conduct condemned in Connell, that the majority found that a claim had been stated under the Sherman Act.

Agreements among employers are not, in themselves, violative of the Sherman Act. To state a claim under the Sherman Act, one must allege that such an agreement has either an anticompetitive purpose or a substantial anticompetitive effect. L. Sullivan, Antitrust 194, 33-04 (1977). See also Neeld v. National Hockey League, 594 F.2d 1297, 1298 (9th Cir. 1979); Alpha Distributing Co. v. Jack Daniel Distillery, 454 F.2d 442, 452 (9th Cir. 1972). Thus, many innocent agreements among employers, such as the bylaws of national and local chambers of commerce, could not possibly be thought to fall within the Sherman Act.

Morevoer, mere elimination of competition over wages and working conditions cannot give rise to an antitrust claim.[1] The Supreme Court stated the applicable test in Connell as follows:

> (An) agreement, which is outside the context of a collective bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates (a company) to subcontract work only to (certain firms), may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business

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[1] For some limitations on this rule, see United Mine Workers v. Pennington, 381 U.S. 657, 664-669 (1965).

> market in ways that would not follow naturally from elimination of competition over wages and working conditions. 421 U.S. at 635 (emphasis added).

Thus, although multiemployer bargaining units may affect or restrain competition in the area of wages and working conditions, such restraints will not be considered to violate the antitrus laws. Accordingly, the question of whether multiemployer bargaining units may be exempt under one of the labor antitrust exemptions need not arise.

At any rate, even if the antitrust laws had been interpreted so as to bring multiemployer bargaining units within the scope of the Sherman Act, the statutory exemption found in Section 4 of the Norris-LaGuardia Act, 29 U.S.C Section 104, when read together with Section 20 of the Clayton Act, 29 U.S.C. Section 52[2], clearly exempts "(b)ecoming or remaining a member. . . of any employer organization" from the antitrust laws. 29 U.S.C. Section 104(b).

In summary, an employer agreement falls within the prohibitions of the Sherman Act only if it has an anticompetitive purpose or effect on some aspect of competition other than competition over wages or working conditions. Certification of multiemployer bargaining units involves not just an agreement among employers but also the consent or agreement of the unions and the approval of the NLRB. Moreover, membership in multiemployer organizations is expressly made exempt from the antitrust laws under the statutory exemption found in Section 4 of the Norris-LaGuardia Act.[3]

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[2] For futher elaboration of this point, see California State Council of Carpenters, No. 77-2323, slip op. at 1040-41 nn. 8 & 9 and accompanying text (9th Cir. Nov. 20, 1980).

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[3] In his dissent from this order, Judge Sneed suggests several scenarios of employer behavior that, he says, might constitute conduct violative of the antitrust laws as interpreted by the majority. The majority opinion, like the Court's opinion in Connell Costruction Co. v. Plumbers Local 100, 421 U.S. 616 (1975), was not intended to establish a comprehensive set of rules governing all imaginable future group conduct by employers. The majority simply holds that employers may not be exempt from the antitrust laws when they indulge in conduct directly analogous to the union conduct found to be non-exempt in Connell.

SNEED, Circuit Judge, Dissenting:

I write briefly once more to state that the above order, which I assume is intended to serve as an amendment to, or at least an exegesis on, the opinion of the majority, does nothing to dispel my concern about that opinion. The key sentence in the order is: "(A)n employer agreement falls within the prohibition of the Sherman Act only if it has an anticompetitive purpose or effect on some aspect of competition other than competition over wages or working conditions." This sentence provides neither a "bright line" nor even a discernible "safe harbor" by which multiemployer bargaining units can fashion their conduct to avoid Sherman Act violations.

To illustrate, suppose the members of a multiemployer bargaining unit believe that the union's popularity with its members is waning. Would a decision by the unit, unanimously approved by unit members, to bargain aggressively in order to provoke a strike which the unit hopes will lead to loss of union representation by the employees violate the Sherman Act? The unit's decision certainly is designed to have an effect "on some aspect of competition other than competition over wages or working conditions" unless these words are construed so broadly as to lose all plain or ordinary meaning. Moreover, the decision is not designed to enhance collective bargaining. Other illustrations of the uncertainty the opinion of the majority creates appear in the margin.[1]

1/ Consider these hypothetical cases:

1. Suppose that one or more, but fewer than a majority, of the members of the multiemployer bargaining unit described in the text oppose attempting to destroy the union, but are required to go along with the other empolyers under the multiemployer bargaining unit's charter. Are the dissenting employers subject to antitrust liability?

2. Members of a multiemployer bargaining unit prefer their employees' representative, union X, to union Y, which is attempting to replace union X. Therefore, the employers agree to bargain very easily with union X. May union Y sue the employers under the Sherman Act? Would it matter whether the employers unanimously adopted the strategy or some opposed it?

3. Consider this case, which is similar to the employer activity challenged in Part XXIV(6) of the Complaint, reprinted in the dissenting opinion, supra n.1. A multiemployer bargaining unit sponsors a workshop on the law relating to decertification of bargaining representatives under Section 9 of the National Labor Relations Act, 29 U.S.C. Section 159 (1976). Both members

This uncertainty springs from the fact that the court's decision has thrust the arm of the Sherman Act deep into the territory of labor law in a

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of the unit and other employers attend the workshop, the goal of which is to reduce union representation. May a union representing employees of an employer workshop participant sue under the Sherman Act?

4. Members of a multiemployer bargaining unit adopt the following strategy for contract negotiations. The members agree to bargain to impasse and then impose the terms of their final offer. They further agree that no member of the unit may agree to separate terms with the union until the union either accepts the unit's final offer or loses its status as bargaining representative. May the union sue under the Sherman Act, even though this agreement is probably an unfair labor practice under Section 8(a)(5), 29 U.S.C. Section 158(a)(5) (1976), which requires good faith bargaining?

In the absence of the majority opinion in this case, each of the hypothetical cases would not suggest an antitrust violation. That is not now the case. Each is hard to distinguish from this case. Each should be treated as a labor case and the antitrust laws should be preempted.

manner and to an extent not presently predictable. Perhaps the decision of the bargaining unit referred to above will lead to an unfair labor practice charge under the National Labor Relations Act. To add to this possibility another consisting of the possible violation of the Sherman Act unwisely suggests the existence of a substantial overlap in the respective spheres of labor and antitrust law. Even if it be assumed that this overlap will only prejudice employers, an assumption I would not make with any confidence, it is a retrogressive step to return labor relations to the uncertain sway of antitrust law.

Appendix C

California State Council of Carpenters,)
etc., et al.,)
)
Plaintiffs,)
)
vs.)
)
Associated General Contractors of)
California, Inc., et al.,)
)
Defendants.)

No. C-75-0260 RFP.

United States District Court,

N. D. California.

August 4, 1975

Order September 10, 1975

MEMORANDUM AND ORDER

Peckham, District Judge.

Motions to dismiss, to strike, for more definite statements, or to stay by various of the defendants were submitted to the court after lengthy oral argument on May 5, 1975. While the case was under submission, the Supreme Court decided the case of Connell Construction Company v. Plumbers and Steamfitters Local Union No. 100 et al., 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975) concerning the application of federal and state antitrust laws in the area of labor relations. In order to permit the parties to comment on the applicability of Connell to this case, on June 24, 1975 the court set a hearing for July 18, 1975 for further argument on the motions previously submitted to the court. The court's order of June 24, 1975 also granted plaintiffs' then pending motion to file a first amended complaint, deemed the pending motions to dismiss the complaint applicable to the first amended complaint, extended the time of all defendants for filing responsive pleadings until ten days after the filing of an order disposing of the pending motions to dismiss, and granted all parties leave to file additional arguments regarding the motion to dismiss as applied to the first amended complaint.

Since the issuance of the court's most recent order, plaintiffs filed on July 9, 1975 a reply memorandum of points and authorities and on July 10, 1975, defendant Associated General Contractors filed a supplemental memorandum in support of its motion to dismiss. On July 16, 1975, the court sent a telegram to counsel for all parties indicating that the pending motions to dismiss would be submitted on July 18, 1975 on the papers filed, without oral argument as previously scheduled.

Plaintiffs sue defendants in a five-count complaint alleging a rather vague, general conspiracy to weaken and destroy the plaintiff unions by hiring non-union persons and various other alleged acts of sabotage. The complaints appear typical of disputes a union might have with an employer, which in the normal course are either presented to the National Labor Relations Board for resolution of charges that defendants have engaged in unfair labor practices, or, if the acts arguably constitute violations of the collective bargaining agreements, are presented through the contract grievance machinery and ultimately to an arbitration panel.

Defendants have responded with motions to dismiss with respect to each of plaintiffs' claims. Alternatively, if the court does not dismiss, defendants seek to have the court strike certain portions of the complaint and compel more definite statements by plaintiffs of the nature of their claim.

The facts set out in plaintiffs' complaint are alleged to constitute five causes of action, upon which plaintiffs claim damages of $775,000,000.

The first cause of action alleges violations of the federal antitrust laws. Defendants cite numerous cases in support of the proposition that disputes between unions and employers do not normally give rise to violations of the antitrust laws. While an agreement between a union and an employer to conspire in some respect may give rise to an antitrust violation, the normal labor dispute between union and employer does not. See, e.g., U.M.W. v. Pennington, 381 U.S. 657, 663, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); Allen Bradley Co. v. IBEW Local 3, 325 U.S. 797, 806-11, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945); Prepmore Apparel, Inc. v. Amalgamated Clothing Workers of America, AFL-CIO, 431 F.2d 1004 (5th Cir.), rehearing and rehearing en banc denied (1970); Kennedy v. Long Island Railroad Co., 319 F.2d 366 (2nd Cir. 1963). The recently decided Connell case, cited supra, raised the question of a union's exemption from suit under the antitrust laws. The discussion of the issue by the court, 421 U.S. at 621-626, 95 S.Ct. at 1834-1837, 44 L.Ed.2d at 425-28, and the subsequent ruling on the merits completely supports the conclusion of this court that plaintiffs' allegations do not raise a claim under the antitrust laws.

In Connell, a union had entered into an agreement with a building contractor which provided, in essence, that the contractor enter into subcontracts only with firms that had a contract with the union. The Supreme Court held, 5-4, that the

> agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal

> antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions.

Connell, supra, 421 U.S. at 635, 95 S.Ct. at 1841, 44 L.Ed 2d at 433. The court declined to exempt the union from application of the federal antitrust laws with respect to the challenged agreement which the contractor entered into under protest.

In the present case, the plaintiff unions claim that defendants have violated the antitrust laws by conspiring among themselves to deter plaintiff unions from organizing the subcontractors with whom the defendant contractors deal. The essence of plaintiffs' claim seems to be that defendants violated the antitrust laws insofar as they declined to enter into agreements with plaintiffs to deal only with subcontractors which were signatories to contracts with plaintiffs, precisely the type of agreement which subjected the union in Connell to antitrust liability. Defendant employers are accused of conspiring in certain activities which would not have a "potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." Connell, supra, 421 U.S. 635, 95 S.Ct. at 1841, 44 L.Ed.2d at 433. Consequently, in light of the explicit holding and discussion in Connell and the considerable body of case law declining to recognize an antitrust cause of action alleged by a union against an employer in the normal type of labor dispute, plaintiffs' first cause of action under the antitrust laws must be dismissed.

Neither International Association of Heat and Frost Insulators and Asbestos Workers et al. v. United Contractors Association, Inc. of Pittsburgh, Pennsylvania, 483 F.2d 384 (3rd Cir. 1973), modified, 494 F.2d 1353 (3rd Cir. 1974), nor Robertson v. National Basketball Association, 389 F.Supp. 867 (S.D.N.Y. 1975), both cited by plaintiffs, compel a contrary result.

The Third Circuit decision in the International Association of Heat and Frost Insulators case, cited supra, was a suit by a group of AFL-CIO trade unions against an association of independent contractors and an association of employees in the construction industry in the Pittsburgh area denominated Associated Trades and Crafts Union. The Court of Appeals upheld the antitrust complaint of the plaintiff unions against a motion to dismiss. The complaint alleged a conspiracy between the defendant employer association and the defendant Associated Trades and Crafts Union to fix prices and restrain trade by engaging in various concerted activities, including execution of a sham collective bargaining agreement between them for the purposes of permitting the members of the employer association to conduct their business activities free from interference by the plaintiff AFL-CIO unions, to use the agreement as a bar to any organizational efforts undertaken by the plaintiff unions, to prevent the employees of the defendant contractor association from becoming members of the plaintiff unions, and to eliminate competition of businesses operating under the terms of bonafide collective bargaining agreements. In upholding the complaint, the Court of Appeals specifically relied on the cases discussed above which permitted antitrust actions in the labor relations area when a conspiracy to restrain trade was alleged involving an agreement between a union and an employer. While the allegations of the complaint in that case attacked a conspiracy between the defendant employer association and the defendant labor organization, the present case charges as defendants only an employer association and its constituent members.

Consequently, the reasoning and result in the International Association of Heat and Frost Insulators is wholly consistent with and supportive of the decision of this court to dismiss plaintiffs' first cause of action.

Robertson v. National Basketball Association, cited supra, is an antitrust suit by a class of present and former basketball players against the National Basketball Association and the American Basketball Association charging the defendant employer associations with conspiring to restrain competition for the services and skills of professional basketball players through such devices as the college draft, the reserve clause in the Uniform Player Contract, the compensation plan attached to the reserve clause, and various boycott and blacklisting techniques. The complaint additionally alleges that the NBA and the ABA seek to effectuate a noncompetition agreement, merger or consolidation. The United States District Court for the Southern District of New York upheld the plaintiffs' standing to sue and refused to dismiss the action against the defendant employer associations on the grounds advanced of an exemption of the labor dispute from application of the antitrust laws. The unique facts of the Robertson case, involving relatively powerless plaintiff employees arrayed against two allegedly independent employer associations accused of conspiring with each other to restrain competition by use of the devices listed above, make the result there reached distinguishable from the present case. In any event, to whatever extent the Robertson result supports plaintiffs' complaint in the present case, this court declines to follow Robertson. Robertson was decided before the Supreme Court opinion in Connell, discussed supra. It is difficult to see how the plaintiffs' first cause of action in this case can be sustained after Connell, which upheld an antitrust claim against a union for pressuring an employer to enter into precisely the type of agreement which the defendant employers here have refused to entertain. Accordingly, in light of the preceding discussion, plaintiffs' first cause of action under the antitrust laws must be, and hereby is, dismissed.

The second cause of action alleges breach of the collective bargaining agreement. While there might be merit to this claim, the plaintiffs have not submitted their dispute through the grievance machinery of the applicable collective bargaining agreements. Section 51 of the Carpenters Agreement sets forth the procedure for resolution of "any dispute concerning any application or interpretation of this agreement"; Section X of the Piledrivers Agreement provides, in pertinent part, ". . . in the event union representatives and the contractor shall be unable to adjust any grievance or dispute arising under this agreement, a Board of Adjustment shall be created for the settlement of such dispute." In light of the broad scope of the arbitration clause, this dispute should be presented first through the grievance machinery, thereby providing the arbitration process an opportunity to determine the merits of this dispute, or at least to determine whether it is subject to arbitration. United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); Unied Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

Plaintiffs have conceded at Page 8 of their memorandum of July 8, 1975, that defendant Associated General Contractors is entitled to be, and hereby is, granted summary judgment with respect to any contract claims based upon the Drywall Industry Contract.

Plaintiff express in their memorandum a willingness to submit this dispute to arbitration. They seek, however, to condition their acceptance of arbitration on the defendants' concession that an arbitrator has full jurisdiction to remedy the practices challeged in plaintiffs' complaint. This concession is not required of defendants. It is sufficient that the parties submit the dispute in good faith to the arbitrator. In light of the very broad arbitration provision in the relevant agreements, the determination of whether this dispute is subject to arbitration should be made, at least in the first instance, by the arbitrator.

The third, fourth, and fifth causes of action allege state claims based, respectively, on the common law tort of interference with contractual relations, the common law tort of interference with business relationship, and alleged violations of the California Cartwright Act, California Businss and Professions Code §16700 et seq. There is no diversity of citizenship between the parties, but plaintiffs claim pendent jurisdiction, assuming the continued viability of the first two causes of action.

These last three claims for relief must be dismissed. The doctrine of federal pre-emption requires that this dispute be governed by federal law. This court has been shown nothing to indicate that the dispute is anything other than a normal labor dispute. Controlling authority dictates that it be governed by the substantive standards and procedural provisions of the National Labor Relations Act and other federal laws. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959); Weber v. Anheuser-Busch, Inc. 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546 (1955); Capital Service, Inc. v. National Labor Relations Board, 347 U.S. 501, 75 S.Ct. 699, 98 L.Ed. 887 (1954). State law may not be used as an alternative remedy, either through common law business torts or state statutory law, unless violence or destruction is involved. No allegations have been made that this case fits into the very limited area left to the jurisdiction of state law.

While the Supreme Court in Connell, supra, was bitterly split, 5-4, over whether the plaintiffs there could state a cause of action against the union under the federal antitrust laws, 421 U.S. at 636, 95 S.Ct. at 1842, 44 L.Ed.2d at 435-44, the dissenters explicitly noted their agreement with the conclusion of the majority that the application of state antitrust laws was preempted by federal labor and antitrust policies. See Connell, supra, 421 U.S. at 654, 95 S.Ct. at 1851, 44 L.Ed.2d at 444, n.13. In light of this recent reaffirmation of the exclusion of state law from areas of labor relations arguably subject to federal law, plaintiffs' third, fourth and fifth causes of action must be, and hereby are, dismissed.

The action is hereby stayed for 120 days, during which time the grievances plaintiffs complain of in the second claim for relief can be presented through the contractual grievance machinery and ultimately to arbitration if the intermediate steps do not result in satisfactory resolution of the dispute.

The parties are hereby ordered to appear for a conference on the status of this action at 10:00 a.m., on Friday, December 5, 1975.

ORDER

Upon reconsideration on the court's own motion of the memorandum and order filed August 4, 1974, in this action, the decision of the court is hereby modified by dismissing the action in its entirety. The previous memorandum dismissed the first, third, fourth and fifth causes of action and concluded by staying the second cause of action pending arbitration of the dispute regarding the collective bargaining agreement. The court is presently of the opinion that a stay would be inappropriate in this action. As a general matter, suits in district court concerning collective bargaining agreements are only filed after exhaustion of the contractual grievance and arbitration machinery. Since this has not yet been done in the present case, it is unnecessary for the present action to remain active. If and when the matter is submitted to arbitration, the arbitrator's determination may be satisfactory to all parties. If not, then will be the proper time for judicial intervention at the instance of the dissatisfied parties.

Accordingly, in light of the discussion above, it is hereby ordered that the second cause of action be, and it hereby is, dismissed, that the action in its entirety be, and it hereby is, dismissed, and that the previously scheduled hearing date of December 5, 1975 is vacated.

It is so ordered.

APPENDIX D

STATUTORY PROVISIONS

15 U.S.C. §1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. §15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §17. Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

29 U.S.C. §52. Statutory restriction of injunctive relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

29 U.S.C.§101. Issuance of restraining orders and injunctions; limitation; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C.§102. Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C.§104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U.S.C.§105. Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

29 U.S.C.§108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

29 U.S.C.§113. Definitions of terms and words used in chapter

When used in this chapter, and for the purposes of this chapter --

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

29 U.S.C.§114. Separability of provisions

If any provision of this chapter or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of this chapter and the application of such provisions to other persons or circumstances shall not be affected thereby.

29 U.S.C.§115. Repeal of conflicting acts

All acts and parts of acts in conflict with the provisions of this chapter are repealed.

APPENDIX "E"

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA STATE) NO. C-75-0260 RFP
COUNCIL OF CARPENTERS,)
UNITED BROTHERHOOD) FIRST AMENDED
OF CARPENTERS) COMPLAINT FOR
AND JOINERS OF) DAMAGES
AMERICA, AFL-CIO, on) (ANTI-TRUST AND
its own behalf and) BREACH OF CONTRACT)
for and on behalf of)
its affiliated)
local unions and)
District Councils;)
and CARPENTERS)
46 COUNTY CONFERENCE)
BOARD, UNITED)
BROTHERHOOD OF)
CARPENTERS AND)
JOINERS OF AMERICA,)
AFL-CIO, on its)
own behalf and for)
and on behalf of its)

affiliated local
unions and District
Councils,

Plaintiffs,

vs.

ASSOCIATED GENERAL
CONTRACTORS OF
CALIFORNIA, INC.:;
each and every,
all and singular the
individual contractors
listed in Exhibit
1 which is attached
hereto and incorporated herein by reference as though fully
set forth; DOES ONE
THROUGH ONE THOUSAND,
inclusive,

Defendants.

I.

Jurisdiction of the District Court is based on 29 U.S.C. Section 185, 15 U.S.C. Sections 4 and 15, 28 U.S.C. Sections 1331 and 1337, and upon pendant jurisdiction over claims based on state law.

II.

Plaintiff CALIFORNIA STATE COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO (hereinafter "State Council") is a labor organization and unincorporated association existing under and pursuant to the laws of the State of California.

III.

Plaintiff CARPENTERS 46 COUNTY CONFERENCE BOARD, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO (hereinafter "Conference Board") is a labor organization and unincorporated association existing under and pursuant to the laws of the State of California.

IV.

Plaintiffs and each of them are collective bargaining representatives for more than fifty thousand individual employees employed by defendants and each of them, within the State of California.

V.

Plaintiffs and each of them are parties to collective bargaining agreements with defendants and each of them, covering the forty-six Northern California counties, and in some cases, the entire State of California.

VI.

Plaintiffs and each of them have entered into these collective bargaining agreements for and on behalf of the affiliated local unions and

District Councils which are specifically described in Exhibit 2, which is attached hereto and incorporated herein by reference. Plaintiffs and each of them bring this suit as a class action under Fed. R. Civ. P. 23, on behalf of each of the affiliated local unions and District Councils described in Exhibit 2. The class which plaintiffs seek to represent is described in Exhibit 2, and consists of all affiliated local unions and District Councils who have been, and continue to be, or might be adversely affected by the practices complained of herein. There are common questions of law and fact affecting the rights of this class. The members of the class are so numerous as to make it impossible to bring them all before this Court, so that joinder of all members of the class is impractical.

VII.

Plaintiff Conference Board is a collective bargaining agent for the carpenter employees described in para. IV and the appropriate affiliated local unions and District Councils with respect to collective bargaining agreements with defendants and each of them in the forty-six Northern California counties. Plaintiff State Council is the collective bargaining agent for carpenters employed in the drywall industry throughout the State of California, for and on behalf of the carpenter employees and the appropriate affiliated local unions and District Councils.

VIII.

The collective bargaining agreements referred to above are master collective bargaining agreements, and govern the carpentry industry, the drywall industry, the piledriving industry, and related industries, and employees within those industries within either the forty-six Northern California counties area or the entire State of California.

IX.

The master agreement covering the drywall industry is entitled "Drywall Master Agreement Between United Brotherhood of Carpenters and Joiners of America, AFL-CIO and California Drywall Contractors Association," and was effective August 1, 1971 to July 31, 1974. A new agreement containing certain modifications and revisions has been entered into, effective at the expiration of the contract referred to above.

X.

The collective bargaining agreement covering the pile driving and related industries is entitled "Pile Drivers, Carpenters, Bridge, Wharf and Dock Builders, Local Union No. 34 Agreement Covering Bridge-Pile Driving-Dock Building-Diving-Divers Working Rules" and was effective July 14, 1971, until June 16, 1974. A new agreement containing certain revisions and modifications has been entered into, effective retroactively to the date upon which the previous agreement expired.

XI.

The master agreement covering the carpenter industry in Northern California was entitled "Carpenters Agreement, 1971-1974, 46 Northern California Counties," and was effective July 14, 1971, until June 15, 1974. A new agreement containing certain agreements and modifications has been entered into retroactively, effective at the conclusion of the previous agreement.

XII.

Plaintiffs and their predecessors, and each of them, and defendants and their predecessors, and each of them, have been parties to collective bargaining agreements and master collective bargaining agreements for better than twenty-five years.

XIII.

These agreements referred to above contain provisions and establish health and welfare, pension, vacation, and apprenticeship plans; the rates of wage payments, and all terms and conditions of employment. Through those payments for wages, and through those plans for health and welfare, medical, dental, vision, hearing, and other related matters are paid for, pension payments made, and payments made for training purposes, to the more than fifty thousand employees involved and the tens of thousands more beneficiaries involved.

XIV.

The wages and benefits and payments referred to above, paid pursuant to said agreements, amount to about

$750,000,000.00 per year. Plaintiffs will pray leave of this Court to amend said complaint, if and when plaintiffs determine that the amount of said payments exceeds $750,000,000.00.

XV.

The principal place of business of plaintiffs and each of them is 995 Market Street, San Francisco, California, within the Northern District of California.

XVI.

Defendant ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., has a principal place of business on Edgewater Road in Oakland, California.

XVII.

Defendant ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., is a non-profit corporation existing under and pursuant to the laws of the State of California. Its membership is composed of various building and construction contractors licensed by the State of California under the contractor licensing laws of that state. Those members are named as individual defendants and are listed in Exhibit 1, which is incorporated herein by reference as though fully set forth.

XVIII.

Many of said members are doing business in this District, and each of said defendants is sued herein individually.

XIX.

In addition to defendant Associated General Contractors of California, Inc., and the individually named defendants, plaintiffs have collective bargaining agreement relationships with approximately three thousand other contractors within the State of California who are not members of the Associated General Contractors of California. These contractors are referred to as "memorandum contractors," because each and every one has signed a memorandum agreement, agreeing to be bound by the terms of the master collective bargaining agreements referred to above.

XX.

At all times herein mentioned, defendants and each of them were acting as the agents and servants of each other defendant, and within the course and scope of said agency.

XXI.

The true names and capacitites, whether individual, corporate or otherwise, of defendants named herein as Does One through Doe One Thousand inclusive are unknown to plaintiffs at this time, and plaintiffs therefore sue said defendants by said fictitious names. Upon ascertaining the names of said defendants, plaintiffs will ask leave of this Court to amend this complaint to show their true names and capacities. Said defendants Does One through Doe One Thousand inclusive are co-conspirators and coparticipants in the illegal acts described herein, and each of them was acting as the agent and servant of each other defendant, and within the course and scope of said agency.

XXII.

The business of construction as described herein directly affects trade and commerce among several states. In the course of this activity, there is a constant and continuous stream of trade and commerce between the states, involving the materials used to produce and construct items for which these contractors are employed.

FIRST CLAIM FOR RELIEF

XXIII.

Since on or about April 1, 1974, and continuing to date, defendants and each of them have entered into a plan, scheme, agreement and conspiracy, knowingly, willfully and maliciously, whose purpose and ends are to abrogate, destroy, undermine, and weaken the collective bargaining relationship between plaintiffs and each of them and defendants and each of them, and between plaintiffs and other parties to the above described collective bargaining agreements; included within the other parties are the California Drywall Contractors Association and all "memorandum contractors" to the above described master collective bargaining agreements.

XXIV.

Pursuant to said plan, scheme, agreement and conspiracy, defendants and each of them have knowingly, willfully and maliciously committed the following acts:

(1) Changed names and corporate status without reason, and as a part of the above described plan, agreement, scheme, and conspiracy, in a fraudulent manner;

(2) Created amd maintained double-breasted contracting situations, in which contractors have established and maintained union and non-union divisions, departments, and/or other such entities;

(3) Advocated, encouraged, induced, and aided non-members of defendant Associated General Contractors of California, Inc. to refuse to enter into

collective bargaining relationships with plaintiffs and each of them;

(4) Advocated, encouraged, induced, coerced, aided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs and each of them;

(5) Advocated, induced, coerced, encouraged, and aided members of Associated General Contractors of California, Inc., non-members of Associated General Contractors of California, Inc., and "memorandum contractors" to enter into subcontracting agreements with subcontractors who are not signatories to

any collective bargaining agreements with plaintiffs and each of them;

(6) Held open-shop meetings for members of defendant Associated General Contractors of California, Inc. and non-members, where said members and non-members were induced, encouraged, coerced, and aided to maintain non-union shops, double-breasted operations, and to do and complete all of the activities described herein. These non-members referred to in this subparagraph were both memorandum contractors and non-memorandum contractors.

(7) Breached the collective bargaining agreements between defendants and each of them and plaintiffs and each of them, by failing to pay agreed-upon

wages, by failing to use the hiring hall, by failing to pay Trust Fund contributions, by failing to observe other terms and conditions of employment, and by generally weakening the good-faith requirement of the collective bargaining agreements.

XXV.

The purpose and effect of the above described activities, plan and conspiracy are oppressive, unreasonable, and illegal, and are in restraint of trade and an unlawful interference and restraint of the free exercise of the business activities of plaintiffs and each of them, all in violation of 15 U.S.C. Section 1. The purpose and effect of the above described activities, plan and conspiracy, in addition, are to weaken, destroy, and restrain the trade of certain contractors, both members of the Associated General Contractors of California, Inc. and non-members, who are "memorandum contractors," who have faithfully performed the terms and conditions set out in the master collective bargaining agreements described above. The effect of this restraint on trade is to further weaken and destroy plaintiffs in this matter. These activities are in restraint of the free exercise of plaintiffs' trade and an interference therein, all in violation of 15 U.S.C. Section 1.

XXVI.

Said actions are malicious and oppressive, in that they are designed to weaken and destroy plaintiffs and each of them and their local unions and District Councils in their contractual relationships and in their ability to act according to their purposes and charters.

XXVII.

As a proximate cause of the plans, scheme, and conspiracy described above, and as a proximate result of the actions and activities described above on the part of defendants and each of them, plaintiffs and each of them have been damaged in the sum of $25,000,000.00

XXVIII.

Pursuant to Title 15, U.S.C. Section 15, plaintiffs request that the damages prayed for be trebled to $75,000.000.00.

SECOND CLAIM FOR RELIEF

XXIX.

Plaintiffs reincorporate and reallege para. I through XXV, and incorporate the same as though fully set forth herein.

XXX.

Said actions and activities are more fully described hereinabove, and said plan and scheme are in breach of the collective bargaining agreements presently in effect between defendants and each of them and plaintiffs and each of them. With respect to the present master collective bargaining agreement with respect to carpenters, violations of the collective bargaining agreement referred to above include, but are not limited to, Sections 4, 6, 7, 37, and 50. With respect to the drywall agreement presently in effect, defendants have violated provisions of the collective bargaining agreements including, but not limited to, Sections I, II, and XIII. With respect to the pile drivers agreement presently in effect, violations of the collective bargaining agreement referred to above include, but are not limited to, Sections I, II, and XIII. Plaintiffs have performed all obligations under those collective bargaining agreements.

XXXI.

Plaintiffs have been damaged in the amount of $25,000,000.00.

THIRD CLAIM FOR RELIEF

XXXII.

Plaintiffs reincorporate and reallege para. I through XXV, and incorporate the same as though fully set forth herein.

XXXIII.

Said actions and activities constitute intentional interference with contractual relations and contracts between plaintiffs and each of them and defendants and each of them.

XXXIV.

Plaintiffs have been damaged in the amount of $25,000,000.00.

XXXV.

Said actions and activities are malicious and oppressive, and therefore punitive and exemplary damages in the amount of $750,000,000.00 are claimed.

FOURTH CLAIM FOR RELIEF

XXXVI.

Plaintiffs reincorporate and reallege para. I through XXV, and incorporate the same as though fully set forth herein.

XXXVII.

Said actions and activities constitute intentional interference with business relationships.

XXXVIII.

Plaintiffs have been damaged in the amount of $25,000,000.00.

XXXIX.

Said actions and activities are malicious and oppressive, and therefore punitive and exemplary damages in the amount of $750,000,000.00 are claimed.

FIFTH CLAIM FOR RELIEF

XL.

Plaintiffs reincorporate and reallege para. I through XXV, and incorporate the same as though fully set forth herein.

XLI.

Said actions and activities and plan and scheme violate the Cartwright

Act, California Business and Professions Code Sections 16700 et seq., and in particular, Section 16720.

XLII.

Plaintiffs have been damaged in the amount of $25,000,000.00.

XLIII.

Said actions and activities are malicious and oppressive, and therefore punitive and exemplary damages in the amount of $750,000,000.00 are claimed.

WHEREFORE, plaintiffs and each of them pray judgment as follows:

1. For damages as to each plaintiff in the amount of Twenty-Five Million Dollars ($25,000,000.00);

2. That insofar as damages are based on 15 U.S.C. Sections 1-15, damages be trebled to the amount of Seventy-Five Million Dollars ($75,000,000.00);

3. For punitive and exemplary damages in the amount of Seven Hundred Fifty Million Dollars ($750,000,000.00) as to each defendant;

4. For costs of suit;

5. For reasonable attorney's fees; and

6. For such other and further relief as to this Court seems just and proper.

DATED: April 30, 1975.

VAN BOURG, ALLEN, WEINBER
WILLIAMS & ROGER

By____________________
Victor J. Van Bourg
Attorneys for Plaintiff

Opposition

FILED

DEC 2 1981

ALEXANDER L. STEVAS.
CLERK

No. 81-334

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1981

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,
Petitioner

vs.

CALIFORNIA STATE COUNCIL OF CARPENTERS AND
CARPENTERS 46 NORTHERN COUNTIES
CONFERENCE BOARD, et al.,
Respondents.

**Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

RESPONSE TO PETITION FOR WRIT OF CERTIORARI OF CALIFORNIA STATE COUNCIL OF CARPENTERS AND CARPENTERS 46 NORTHERN COUNTIES CONFERENCE BOARD

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No. 81-334

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1981

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,
Petitioner

vs.

CALIFORNIA STATE COUNCIL OF CARPENTERS AND
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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI OF CALIFORNIA STATE COUNCIL OF CARPENTERS AND CARPENTERS 46 NORTHERN COUNTIES CONFERENCE BOARD

I

A STATEMENT OF THE CASE

This is an antitrust action brought by various Carpenter Unions in California against a group of employers alleging that they have instituted a group boycott whose purpose is to destroy the labor organizations. As we shall show below, there is no reason why this Court should grant the petition for a writ of certiorari.

II

THE ANTITRUST LAWS PROHIBIT GROUP BOYCOTTS

Whether an antitrust claim may be stated in light of the labor laws depends largely upon how one characterizes the complaint in this matter. The court below properly characterized this complaint as alleging a group boycott in which the defendant employers were attempting by various means to eliminate union contractors from construction projects. 648 F.2d at 531. By direct and indirect means, the employers are alleged to be engaged in the scheme to coerce others not to use unionized subcontractors, thus inflicting harm not only upon those subcontractors but upon the unions and the members they represent as well.

Petitioners' claim that the decision of the court below conflicts with that of other circuits (Petition, p. 7-12) is incorrect. None of the cases cited concern an effort by employers to boycott other non-labor entities, in this case unionized subcontractors. The fundamental distinction is the nature of the group boycott directed at unionized employers.

Moreover, the decision of the court below is supported by other circuits in similar situations. See *International Association of Heat & Frost Insulators and Asbestos Workers v. United Contractors Association, Inc.*, 483 F.2d 384 (3d Cir. 1972), *modified*, 494 F.2d 1353 (3d Cir. 1974); and *Carpenters District Council v. United Contractors Association of Ohio*, 484 F.2d 119 (6th Cir. 1973), *modified*, 539 F.2d 1092 (6th Cir. 1976).

Petitioners emphasize, as did the dissent below, that this is an alleged perversion of this Court's decision in *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). The court below recognized that the decision is not dispositive but only supportive. 648 F.2d at 531-532. In that case this Court recognized that the antitrust laws may regulate unlawful conduct where it is not directly involved in the collective bargaining relationship. Here, Petitioners have engaged in a group boycott directed at unionized contractors and subcontractors whose direct impact will be upon the labor organizations which brought this action.

As the court below noted, this a common type of antitrust claim well recognized in the courts. 648 F.2d at n.5.

III

THE STATUTORY EXEMPTION DOES NOT APPLY TO THIS GROUP BOYCOTT

Petitioners rely heavily upon Section 20 of the Clayton Act, 29 U.S.C. Section 52, to establish a statutory exemption from the antitrust laws to their alleged group boycott. See Petition, p. 17-20. The court below correctly noted that that section has not served to protect *employers'* conduct. 648 F.2d 532-536.

Petitioners' assertion that the decision of the court below conflicts with that of other Circuit is incorrect. For example, in *Local Union 576 v. Wetterau Foods, Inc.*, 579 F.2d 133 (3th Cir. 1979), the court applied the nonstatutory as well as the statutory exemption because the agreement which was alleged to be unlawful "had no anticompetitive effect unrelated to the collective bargaining negotiations." 597 F.2d 134. To the contrary, the group boycott whose goal is to destroy unionized contractors as well as the unions is precisely of the kind of conduct condemned by the antitrust statutes. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); and *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945).

No substantial issue is presented to this Court with respect to the scope of the so-called statutory exemption.

IV

SINCE THE DIRECT EFFECT OF THE GROUP BOYCOTT IS DAMAGING TO THE UNIONS AND THEIR MEMBERS, THEY MAY BRING AN ANTITRUST CLAIM

The Ninth Circuit extensively discussed the "standing" issue. It came to the correct conclusion that a direct injury was imposed upon the unions as a "foreseeable consequence" of the conduct of the employers in effecting their group boycott. 647 F.2d at 538. Petitioners do not appear to challenge this conclusion, but rather suggest that unions are not proper vehicles to allege damage to themselves or to their members. See Petition, p. 22-23. Cf. *Warth v. Seldin*, 422 U.S. 490 (1975).

This Court has, to the contrary, recognized that unions may bring actions on behalf of their members. See *Smith v. Evening News Association*, 371 U.S. 195 (1962). Unions have, therefore, brought many actions on behalf of their members to right statutory wrongs. Cf. *Social Services Union, Local 535, v. County of Santa Clara*, 609 F.2d 944 (9th Cir. 1979). Moreover, the Union clearly has an organizational interest with respect to the actions of the employers. See *Warth v. Seldin, supra.*

CONCLUSION

For the reasons suggested above, there is no compelling reason for this Court to grant the petition for writ of certiorari and it should, therefore, be denied.

Dated: December 3, 1981.

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No. 81-334

In the Supreme Court of the United States

October Term, 1981

Associated General Contractors of California, Inc.,
Petitioner,
vs.
California State Council of Carpenters and Carpenters
46 Northern Counties Conference Board, et al.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief of Respondent, The Harold E. Shugart Company, Inc., In Support of Petition for Writ of Certiorari

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief of Respondent, The Harold E. Shugart Company, Inc., In Support of Petition for Writ of Certiorari

Respondent, The Harold E. Shugart Company, Inc., respectfully requests that this Court grant the petition for writ of certiorari filed by petitioner Associated General Contractors of California, Inc., to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 5, 1981. The opinion of the court of appeals is reported at 648 F.2d 527.

The petition should be granted for two reasons. First, the decision below improperly thrusts antitrust law and antitrust claims into the sphere of controversies properly reserved for labor law. Second, even apart from the labor dimension of the case, the decision of the court of appeals improperly expands the class of permissible antitrust plaintiffs.

I.

STATEMENT OF THE CASE

Respondent, The Harold E. Shugart Company, Inc., ("Respondent") is a contractor named, along with hundreds of other contractors, as a defendant in this action. Respondent, the only individual contractor defendant which filed a brief in the court of appeals, urges that the petition be granted.

The first amended complaint ("complaint") alleges that the plaintiffs are labor organizations functioning as the collective bargaining representatives of "more than 50,000 individual employees employed by defendants." App. E, p. 4.[1] Plaintiffs are further alleged to be parties to collective bargaining agreements with defendants and each of them." *Id.* The sole claim at issue here, the purported antitrust violation set forth in plaintiffs' "First Claim For Relief," alleges that the defendants conspired "to abrogate, destroy, undermine, and weaken the collective bargaining relationship" existing between plaintiffs and defendants. App. E, p. 16. Although the complaint alleges that the defendants have engaged in a variety of conduct pursuant to the alleged "conspiracy," the court of appeals, at the invitation of plaintiffs,[2] based its reversal of the district court's dismissal of the complaint upon plaintiffs' allegation that the defendants had conspired to coerce and persuade "owners of land and other letters of construction contracts," as well as other general contractors, to employ contractors and subcontractors who had not signed collective bargaining agreements with plaintiff. App. A, p. 13.

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[1] All references to appendices are to the appendices attached to the Petition for Writ of Certiorari.

[2] "The gravamen of the complaint . . . is directed to the fact that these defendants are conspiring among themselves to avoid using construction contractors and subcontractors who do in fact have collective bargaining agreements with plaintiffs . . . ." Brief on Behalf of Appellants, p. 5.

II.

ARGUMENT

A. The Decision of the Ninth Circuit Makes the Antitrust Claim a Weapon in the Arsenals of Collective Bargaining Adversaries.

The decision of the court of appeals interjects antitrust principles and claims into the field of collective bargaining, a domain hitherto properly reserved to labor law. The consequence is not simply that this labor dispute will be resolved by recourse to antitrust law, or to an uncertain mix of labor and antitrust law. More importantly, the decision below, by the breadth and vagueness of its holding, assures that, if permitted to stand, this case will not be an isolated legal curiosity, but rather a landmark foreshadowing an abrupt change of direction in the course of law in this area.

That antitrust law and labor law spring from radically different policies and operate on radically different principles is beyond dispute. While the primary purpose of the former is to preserve and protect competition in commercial markets, a primary purpose of the latter is to legalize and even to promote the suppression of competition in the labor market.

Past decisions of this Court and of the lower courts have resolved the occasional conflicts that have arisen between these two regimes not by inter-mixing the two, but rather by, first, strictly defining the perimeter of the collective bargaining battlefield and, second, holding labor law supreme upon that field. Analysis of the borderline cases that have arisen, involving varying combinations of labor and management combatants and third parties, indicates that certain rules have evolved to assure that each body of law is confined to its own proper field of application.

> (1) The combatants themselves may not use antitrust claims as weapons against one another in their collective bargaining wars. *Apex Hosiery Co. v. Leader*, 310 U.S. 982, 60 S.Ct. 982 (1940).

(2) Third parties may not sue combatants on antitrust claims based upon the suppression of competition "over wages and working conditions." *Connell Construction Co., Inc. v. Plumbers & Steam. Loc. U. No. 100,* 421 U.S. 616, 95 S.Ct. 1830, 1836 (1975).

(3) At least under some circumstances, third parties may sue combatants on antitrust claims not growing out of the suppression of competition over wages and working conditions. *Connell, supra.*

(4) Third parties are not barred by the labor exemption from pursuing antitrust claims arising from joint action by purported combatants (i.e., sham combat). *Allen Bradley Co. v. Local Three, International Brotherhood of Electrical Workers,* 325 U.S. 797, 65 S.Ct. 1533 (1945).

The decision below violates the first of these rules. Moreover, the breadth of that decision, if permitted to stand, assures that this will not be the only labor controversy to be decided by a mixed application of antitrust and labor law principles. In particular, the court of appeals held that the antitrust cannon may be rolled onto the labor battlefield whenever an agreement between employers "has an anticompetitive purpose or effect on some aspect of competition other than competition over wages or working conditions." App. B, p. 8. Two implications of this holding are immediately apparent.

First, the uncertainty of the standard combined with its apparently broad scope will encourage labor adversaries to invoke the antitrust sanction in a large number of cases arising in a variety of settings. The examples set forth in footnote 1 of Judge Sneed's dissenting opinion could easily be multiplied manifold. App. B, pp. 10-14.

Second, the nature of the Ninth Circuit's ruling not only assures that antitrust claims will frequently be interjected into labor cases, but also assures that, once raised, such claims will not admit of prompt or easy resolution. In antitrust parlance, the decision below did not create a narrow, well-defined *per se* violation applicable in labor contexts; rather it established a standard more nearly comparable to the "rule of reason." Under the decisions of this Court summary judgment, to say nothing of a dismissal on the pleadings, is not easily obtained in an antitrust case even where a *per se* offense is charged[3]; such dispositions short of trial are rare indeed in "rule of reason" cases.

Nor will the trip to trial in such an amalgamated labor-antitrust controversy be swift: antitrust cases, even those unencumbered by alleged labor law violations, are notorious for their length, complexity, and expense. The opinion below gives no clue as to how flinging labor disputes into the antitrust morass is to be reconciled with the Congressional mandate of prompt hearing and resolution of such disputes.[4]

The above considerations underscore the importance of this Court's seizing and disposing of this case and this issue *now*, at the pleading stage. Even should the Court be inclined to endorse in some fashion the sharp departure from the prior course of antitrust and labor law begun by the Ninth Circuit in this case, the petition for certiorari should be granted to clarify the pleading requirements of such a claim. Absent firm guidance at the pleading stage sufficient to permit meritless antitrust claims to be detected and disposed of at the outset, even garden-variety labor disputes will be both complicated and delayed by the interjection of spurious antitrust issues.

The lower courts should not be compelled to even begin the fruitless task of attempting to sketch the dimensions of the new hybrid antitrust-labor case created by the opinion below. The petition should be granted in order to nip in the bud this unwarranted departure from the course of prior law.

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[3] The leading case is *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

[4] *See, e.g.*, 29 U.S.C. § 160(i) (requiring "expeditious" hearing of labor cases in the courts of appeal).

B. The Decision Below Improperly Expands the Class of Permissible Antitrust Plaintiffs

Even apart from the labor dimension of this case, the decision below merits review by this Court because it authorizes a vast expansion in the class of proper antitrust plaintiffs.

The court of appeals likened the antitrust count in the complaint to "a group boycott" by defendants of subcontractors with whom plaintiffs have collective bargaining relationships. Taking that legal characterization of the claim at face value, the immediate impact of any such "boycott" would be felt by the subcontractors themselves. Tracing the chain of causation a step further, any resulting diminution of the subcontractors' business prospects might be felt, in varying degrees and in varying ways, by the employees of such subcontractors. Finally, any impact upon the unions themselves and their "business" of organizing and representing employees would be felt only to the extent transmitted to the unions by the individual employees themselves.

The court of appeals has purportedly justified this attempt to sue by these highly peripheral claimants by pointing to the allegation in the complaint that defendants "intended" the harm plaintiffs claim to have suffered. App. A, p. 51.

Prior decisions of this Court leave no doubt, however, that remote plaintiffs may not present a triable case by the simple expedient of pleading "foreseeable" or even "intentional" infliction of harm. For example, an allegation of intentional injury would not have changed the result in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), where this Court forbade second-tier purchasers from maintaining a private antitrust action. Such practical considerations as the difficulty of tracing and measuring damages as the chain of causation grows longer are no less compelling even where "foreseeability" or "intention" are pled. Similarly, allegations that the defendants did or should have foreseen the harm to plaintiffs resulting from defendant's antitrust violation would not have changed the outcome in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), where the Court rejected a claim of an antitrust plaintiff who alleged injury from a procompetitive effect of an unlawfully anticompetitive merger.

Not only is the legal standard announced by the court of appeals in this case out of step with prior decisions of this Court, but, viewed from a larger perspective, the ruling below simply adds one more layer of confusion to the quagmire that is antitrust standing as developed by the lower courts. In the absence of guidance from this Court, the situation has become nothing less than chaotic[5]. Both the courts[6] and the commentators[7] have

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[5] Experimentation with standing requirements has led to increasing disparity between the circuits. The Second, Fourth, Fifth and Ninth Circuits follow the "target area" formulation. *Commerce Tankers Corp. v. National Maritime Union of America,* 553 F.2d 793, 801 (2d Cir. 1977) *cert. denied,* 434 U.S. 923 (1977); *Calderone Enterprises Corp. v. United Artists Theatre Circuit,* 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972); *South Carolina Council of Milk Producers, Inc. v. Newton,* 360 F.2d 414, 418 (4th Cir. 1966), *cert. denied,* 385 U.S. 934 (1966); *Donovan Const. Co. of Minnesota v. Florida Telephone Corp.,* 564 F.2d 1191, 1192 (5th Cir. 1977), *cert. denied,* 435 U.S. 1007 (1978); *Tugboat, Inc. v. Mobile Towing Co.,* 534 F.2d 1172, 1175 (5th Cir. 1977); *In re Multidistrict Vehicle Air Pollution,* 481 F.2d 122, 127 (9th Cir. 1973), *cert. denied,* 414 U.S. 1045 (1973).

The Tenth Circuit adheres to the "direct injury" standard. *Farnell v. Albuquerque Publishing Co.,* 589 F.2d 497, 500 (10th Cir. 1978); *Reibert v. Atlantic Richfield Co.,* 471 F.2d 727, 733 (10th Cir. 1973), *cert. denied,* 411 U.S. 938 (1972).

The Third Circuit, which developed the "direct injury" standard, now disapproves of both the "direct injury" and the "target area" approaches. It favors, instead, ". . . a balancing test comprised of many constant and variable factors . . ." *Bravman v. Basset Furniture Industries, Inc.,* 552 F.2d 90, 99 (3d Cir. 1977), *cert. denied,* 434 U.S. 823 (1977).

The District of Columbia Circuit requires a "causal connection between the injury and the defendant's allegedly illegal acts." *Hecht v. Pro-*

expressed dismay at the confusion and conflict in the lower courts' decisions in this area. This case is an apt vehicle for the Court to bring long-needed order to the law of antitrust standing.

Football, Inc., 570 F.2d 982, 987 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

The Seventh Circuit is without a standard. It had adopted the Sixth Circuit's "zone of interest" approach expressed in *Malamud v. Sinclair Oil Co.*, 521 F.2d 1142, 1151 (6th Cir. 1975) but now doubts that the *Malamud* approach survives this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1169 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

6. See e.g., *Wobb v. Ford Motor Co.*, 76 F.R.D. 452, 456, n.2 (W.D.Pa. 1977) ["The perplexing question of who is entitled to sue under the antitrust laws, never being definitely addressed by the Supreme Court, has led to inconsistent lower federal court opinions."]; *Wilson v. Ringsby Truck Lines, Inc.*, 320 F.Supp. 699, 701 (D.Colo. 1970) ["We must confess at the outset that we find antitrust standing cases more than a little confusing and certainly beyond our powers of reconciliation."].

7. D. Berger and R. Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 840 (1977) [referring to the "decisional morass" in the standing area and noting the lack of "an analytical framework that could make order of the chaos"]; M. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits: The Twenty-Third Annual Antitrust Review*, 71 Colum.L.Rev. 1, 28 (1971) ["The plain fact is that the standing-to-sue cases are irreconcilable. And the case law has become increasingly confused"]; J. Beane, *Antitrust: Standing and Passing On*, 26 Baylor L.Rev. 331, 333 (1974) ["Without definitive guidance from the Supreme Court with respect to standing in antitrust matters, the circuit courts have entrenched themselves into respective camps with regard to the analysis of standing to sue. Although common in goal, these respective approaches have substantial and marked differences in analysis"]; Comment, *Standing to Sue in Antitrust: The Application of Data Processing to Private Treble Damage Actions*, 11 Tulsa Law J. 542 (1976) ["[d]espite six decades of unresolved controversy, the Supreme Court has failed to give a definitive treatment to the rigid standing requirements under section 4 of the Clayton Act"]; Note, *Standing to Sue in Private Antitrust Litigation: Circuits in Conflict*, 10 Ind.L.Rev. 532, 554 (1977) [Given the conflict in the circuits, "if the choice exists, a potential private antitrust litigant who has been in any way remotely injured would be much wiser to opt for the nonrestrictive views of the Fourth, Sixth, Seventh, Eighth, or Ninth Circuits, than for the uncertain approaches of the Fifth, Tenth, and District of Columbia Circuits. Care should be taken especially to avoid the restrictive views of the First, Second, and Third Circuits if possible"].

III.
CONCLUSION

For the reasons set forth above, a writ of certiorari should issue as prayed by petitioner to review the decision of the Court of Appeals for the Ninth Circuit.

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No. 81-334

IN THE

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ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,
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v.

CALIFORNIA STATE COUNCIL OF CARPENTERS and CARPENTERS 46 NORTHERN COUNTIES CONFERENCE BOARD,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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Questions Presented

1. Whether a union's claim that an employers' association and its members engaged in unilateral concerted activity to weaken the collective bargaining relationship between the union and the association states a claim cognizable under section 1 of the Sherman Act, 15 U.S.C. §1.

2. Whether section 20 of the Clayton Act, 29 U.S.C. §52, shields employers from liability under the federal antitrust laws for concerted activities undertaken unilaterally against a union with which the employers have a collective bargaining relationship.

3. Whether a union's allegation that an employers' association and its members breached their collective bargaining relationship with the union and engaged in statutorily defined unfair labor practices states a claim under federal antitrust laws.

4. Whether a union has standing to seek damages under section 1 of the Sherman Act, 15 U.S.C. §1, for alleged injury to union-signatory employers or for alleged injury to non-plaintiff local unions and district councils for economic losses suffered as a result of alleged concerted activity directed against the unionized employers.

Parties to This Action

The parties to this action are:

1. Associated General Contractors of California, Inc., a non-profit trade association;

2. The California State Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, an unincorporated labor organization; and

3. The Carpenters 46 Northern Counties Conference Board, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, an unincorporated labor organization.

In addition, the following district councils and local unions, though not formal parties to the action, are purportedly represented by the labor organizations listed above:

a. Bay Counties District Council, and Local Union Nos. 22, 34, 35, 36, 42, 102, 162, 194, 478, 483, 550, 642, 848, 1068, 1149, 1158, 1408, 1473, 1622, 1861, 2046, 2095, 2164, 2565, and 3116.

b. Central California District Council, and Local Union Nos. 1959, 2559, 2561, 2562, 2687, 2688-S, 2707-S, 2728-S, 2749-S, 2762-S, 2801, 2838-S, 2927-S, 3088, 3170-S, 2882, and 3184-S.

c. Delta-Yosemite District Council, and Local Union Nos. 266, 386, 1235, 1418, and 1869.

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No. 81-334

IN THE

Supreme Court of the United States

October Term, 1981

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,
Petitioner,

v.

CALIFORNIA STATE COUNCIL OF CARPENTERS and CARPENTERS 46 NORTHERN COUNTIES CONFERENCE BOARD,
Respondents.

BRIEF OF PETITIONER

I

OPINIONS BELOW

1. *California State Council of Carpenters v. Associated General Contractors of California, Inc.*, 648 F.2d 527 (9th Cir. 1980), *rehearing and rehearing en banc denied*, 648 F.2d 527, 542 (9th Cir. 1981). The opinions of the court of appeals are reproduced as Appendices "A" and "B" to the Petition for Writ of Certiorari.

2. *California State Council of Carpenters v. Associated General Contractors of California, Inc.*, 404 F. Supp. 1067 (N.D. Cal. 1975). The memorandum opinion and order of the district court is reproduced as Appendix "C" to the Petition for Writ of Certiorari.

II
JURISDICTION

Jurisdiction of the Court is invoked pursuant to Title 28 United States Code, section 1254(1).

The opinion of the Court of Appeals for the Ninth Circuit was filed on November 20, 1980.

The petition for rehearing and suggestion for rehearing en banc were timely filed on December 1, 1980. The court of appeals filed its order denying the petition for rehearing and suggestion for rehearing en banc on May 22, 1981.

The Petition for Writ of Certiorari was filed on August 14, 1981, and was granted by the Court on January 11, 1982.

III
STATUTORY PROVISIONS

The relevant statutory provisions are:

1. Sherman Act, section 1, 15 U.S.C. §1.
2. Clayton Act, section 4, 15 U.S.C. §15.
3. Clayton Act, section 6, 15 U.S.C. §17.
4. Clayton Act, section 20, 15 U.S.C. §52.
5. Norris-LaGuardia Act, sections 1-15, 29 U.S.C. §§101-115.

Pertinent portions of these statutory provisions are reproduced at Appendix "D" to the Petition for Writ of Certiorari.

IV
STATEMENT OF THE CASE

A. Procedural Background

In 1975, the California State Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and the Carpenters 46 Northern Counties Conference Board (hereinafter referred to collectively as the "Unions") filed this action. [R. 1]

The complaint named the Associated General Contractors of California, Inc. (hereinafter "AGC"), an association of construction industry employers, as the primary defendant. [R. 1-10] The Unions attached a computer printout of AGC's members to the complaint, and designated the members named in the printout as co-defendants. [R. 11-19]

AGC filed a motion to dismiss the action for failure to state a claim upon which relief could be granted. [R. 147-83] Following the filing of the motion to dismiss, the Unions secured the district court's permission to file a first amended complaint to "cure alleged defects claimed in the motion to dismiss." [R. 360] The district court permitted the filing of the first amended complaint, but, at the request of AGC, ordered that the pending motion to dismiss be "deemed applicable to the first amended complaint." [R. 423-24]

The Unions' first amended complaint[1] set forth five separate claims for relief, each founded upon the same allegations. [R. 363-74] The first count sought damages for alleged violation of section 1 of the Sherman Act. Subsequent counts sought damages for breach of the collective bargaining agreements between AGC and the Unions, interference with contractual relations, interference with business relationships, and violation of state antitrust laws. [R. 363-74]

On August 4, 1975, the district court filed its memorandum and order dismissing all counts except the claim based on alleged breach of the collective bargaining agreements. [R. 471-79] Subsequently, the district court reconsidered the matter on its own motion, and on September 10, 1975, it entered a further order dismissing the action in its entirety. 404 F. Supp. at 1072-73.

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[1] For the sake of brevity, the Unions' first amended complaint will be referred to as the "Complaint."

The Unions chose not to seek leave of the court to further amend their Complaint. Instead, on October 9, 1975, the Unions filed a notice of appeal. [R. 505]

The case was argued before a panel of the United States Court of Appeals for the Ninth Circuit in January, 1980. On November 20, 1980, a divided panel issued an opinion sustaining the district court's dismissal of counts two through five of the Complaint, but reversing the district court's dismissal of the Unions' Sherman Act claim. 648 F.2d at 527.

AGC timely filed a petition for rehearing and suggestion for rehearing en banc. An active judge of the court of appeals requested a vote on the suggestion for rehearing en banc. The vote was taken, but a majority of the active judges failed to vote in favor of rehearing the cause en banc. The original panel therefore issued an order on May 22, 1981, denying the petition for rehearing and rejecting the suggestion for rehearing en banc. 648 F.2d at 542. The panel also issued a further opinion to which one member of the panel dissented.

B. The Facts

The sufficiency of the plaintiffs' first claim for relief, and the question of plaintiffs' standing to bring the claim, are the issues before the Court. The "facts" which are before the Court are the ultimate factual allegations set forth in the Unions' Complaint, which are accepted as true in the present posture of the case.[2] The sufficiency of the Unions' claim must be judged solely on the basis of such allegations.[3]

---

[2] This Court will assume the truth of factual allegations set forth in a complaint in reviewing the propriety of an order granting a motion to dismiss. *Cruz v. Beto*, 405 U.S. 319, 322, 92 S.Ct. 1079, 1082 (1972).

[3] In this case, petitioner's motion to dismiss was filed and served before the Unions filed their first amended complaint. Consequently, the Unions were aware of each of the legal points relied on by petitioner to attack the sufficiency of the Unions' allegations before the first amended complaint was filed. Moreover, the Unions elected not to seek leave to further amend their first amended complaint after the district court granted AGC's motion to dismiss the first amended complaint. Under such circumstances, it is reasonable to assume that the Unions stated all facts in their favor to support the claimed violation of the Sherman Act.

The plaintiffs in this case are regional labor organizations. The plaintiffs purport to bring the suit as a class action "on behalf of each of the affiliated local unions and District Councils" described in an exhibit to the Complaint. [R. 364] The class plaintiffs seek to represent consists of "all affiliated local unions and District Councils who have been, and continue to be, or might be adversely affected by the practices complained of herein." [R. 364]

Defendants are the Associated General Contractors of California, Inc., and those members listed on a computer printout attached as an exhibit to the Complaint. [R. 363]

Plaintiffs and their predecessors, and each of them, and defendants and their predecessors, and each of them, are alleged to have been parties to collective bargaining agreements with each other for over twenty-five years. [R. 366] Plaintiffs also have had collective bargaining relationships with other entities who are not members of AGC, referred to as "memorandum contractors." [R. 367]

The facts which are alleged to constitute a violation of section 1 of the Sherman Act are as follows:

1. Defendants "have entered into a plan, scheme, agreement and conspiracy . . . whose purpose and ends are to abrogate, destroy, undermine, and weaken the collective bargaining relationship between plaintiffs and each of them and defendants and each of them, and between plaintiffs and other parties to the above described collective bargaining agreements . . . ." [R. 368-69]

2. Defendants have committed the following acts in furtherance of the "conspiracy:"

a. "Changed names and corporate status without reason . . .;" [R. 369]

b. "Created and maintained double-breasted contracting situations, in which contractors have established and maintained union and non-union divisions, departments, and/or other such entities;" [R. 369]

c. "Advocated, encouraged, induced and aided non-members of defendant Associated General Contractors of California, Inc. to refuse to enter into collective bargaining relationships with plaintiffs . . .;" [R. 369]

d. "[A]ided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs . . .;" [R. 369]

e. "[E]ncouraged and aided members of Associated General Contractors of California, Inc., non-members of Associated General Contractors of California, Inc., and 'memorandum contractors' to enter into subcontracting agreements with subcontractors who are not signatories to any collective bargaining agreements with plaintiffs . . .;" [R. 369]

f. "[H]eld open-shop meetings for members of defendant [AGC] and non-members, where said members and non-members were induced, encouraged, coerced, and aided to maintain non-union shops [and] double-breasted operations . . .;" [R. 369-70]

g. "Breached the collective bargaining agreements between" plaintiffs and defendants by violating various terms thereof and "by generally weakening the good-faith requirement of the collective bargaining agreements." [R. 370]

3. The effect of defendants' actions has been to "weaken and destroy plaintiffs." [R. 370]

C. Decisions Below

The district court dismissed the plaintiffs' antitrust claim relying on "the considerable body of case law declining to recognize an antitrust cause of action alleged by a union against an employer in the normal type of labor dispute." 404 F. Supp. at 1070, citing, *inter alia*, *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801, 92 S.Ct. 21

(1971), and *Kennedy v. Long Island Railroad*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 980, 84 S.Ct. 75 (1963).

The district court found support for its reasoning in this Court's opinion in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 95 S.Ct. 1830 (1975), finding that the defendants' alleged activities did not have a potential for restraining competition in the business market "in ways that would not follow naturally from elimination of competition over wages and working conditions." *Id.* at 1070. The court also relied on decisions of this Court holding that antitrust violations may arise by virtue of an agreement between a union and an employer to restrain commercial competition, but distinguished the instant action on the grounds that no employer-union conspiracy was alleged.[4]

The Ninth Circuit reversed the district court's dismissal of plaintiffs' Sherman Act claim. Characterizing the Unions' Complaint as charging a "conspiracy to boycott union-signatory subcontractors," and focusing on the allegations that the defendants had conspired to coerce owners of land and other "letters of contracts" to hire only non-signatory contractors and subcontractors, the Ninth Circuit held that the Unions' allegations "present virtually the obverse of the situation described in *Connell*." *Id.* at 532. According to the court, the Complaint alleged that AGC "sought to coerce owners of property, general contractors, and other letters of construction contracts, with whom the Unions had no collective bargaining relationship, to hire only construction firms, primarily subcontractors, who had not signed with the Unions." The court found *Connell's* rationale equally applicable to this case, and held that the defendants could be found to have violated the Sherman Act based on the allegations of the Complaint. *Id.*

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[4] For the same reasons, the court distinguished *International Association of Heat and Frost Insulators v. United Contractors Association, Inc.*, 483 F.2d 384 (3d Cir. 1973), relied on by the Unions.

The court of appeals also held that the defendants' actions were not exempt from the antitrust laws. Reading the statutory exemption to the antitrust laws as designed primarily to protect workers and employee organizations, the court held that the defendants' conduct, which it classified as "anti-union," fell outside the statutory exemption. *Id.* at 533.

Lastly, the court of appeals held that the Unions had standing to bring the action against defendants for treble damages under section 4 of the Clayton Act.

V

SUMMARY OF ARGUMENT

1. The Unions' Complaint fails to state a claim for relief under section 1 of the Sherman Act. The acts alleged by the Unions do not constitute a "restraint of trade" as that term has been interpreted by this Court and other courts. Under section 1 of the Sherman Act, an actionable restraint of trade must involve "some form of restraint upon commercial competition in the marketing of goods or services . . . ." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S.Ct. 982 (1940). No such restraint is alleged here.

2. The unilateral labor relations activities of AGC and its members cannot properly be characterized as an actionable "group boycott." Though this Court has held group boycotts to be *per se* illegal under section 1 of the Sherman Act, the cases in which the *per se* rule has been applied have involved restraints in the commercial market for goods and services. *See, e.g., Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705 (1959). Application of a "group boycott" analysis to attack labor relations activities of a multiemployer association and its members in the collective bargaining context is inappropriate, given this Court's explicit support for the concept of multiem-

ployer bargaining, *NLRB v. Truck Drivers Local 449 (Buffalo Linen)*, 353 U.S. 87, 77 S.Ct. 643 (1957), and this Court's approval of multiemployer action to support the employers' position in dealing with the union, *NLRB v. Brown*, 380 U.S. 278, 85 S.Ct. 980 (1965).

3. The Ninth Circuit's holding flies in the face of this Court's decision in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 95 S.Ct. 1830 (1975). *Connell* held that an agreement between a general contractor and a union which did *not* seek to represent the general contractor's employees, limiting the contractor's right to subcontract work only to subcontractors employing members of the union, was subject to scrutiny under the Sherman Act as a potentially illegal restraint of trade. In the present case, the antagonists are parties to a long-standing collective bargaining relationship, and the acts alleged took place within the context of that relationship.

4. The use of Sherman Act remedies to govern employer conduct in a collective bargaining context is wholly inappropriate, since the remedies provided by the Sherman Act and the National Labor Relations Act are entirely inconsistent. Section 4 of the Clayton Act provides that a successful plaintiff prosecuting a Sherman Act claim shall be awarded treble the amount of his actual damages, plus his attorneys' fees; the treble damages provided under section 4 are a form of punitive or exemplary damages, designed to deter further anticompetitive conduct. By contrast, section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a), which provides the statutory basis for suits for breach of collective bargaining agreements, provides for no automatic award of punitive or exemplary damages, and does not permit the award of attorneys' fees. Similarly, the National Labor Relations Board's power to fashion remedies for unfair labor practices is limited to making the injured party "whole." Application of these conflicting sets of rem-

edies to the same conduct would produce very disparate results.

5. Section 20 of the Clayton Act, 29 U.S.C. §52, provides a broad statutory exemption from antitrust liability to "any person" who ceases to "employ any party to [a labor] dispute, or from recommending, advising, or persuading others by peaceful and lawfuls means so to do . . . ." Lower courts have suggested that such immunity does exist. *See Amalgamated Meat Cutting Local 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979); *Kennedy v. Long Island Railroad*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830, 84 S.Ct. 75 (1963). The legislative history of section 20 supports the view that Congress intended that both employers and unions would enjoy statutory immunity from the antitrust laws, when unilaterally acting in their own interests with regard to labor matters. This Court's decision in *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 65 S.Ct. 1533 (1945), relied upon by the Ninth Circuit, is not apposite, since *Allen Bradley* did not involve unilateral activity by employers in a collective bargaining context.

6. The Unions lack standing to pursue the Sherman Act claims alleged in the Complaint. In this case, the Unions are at least three steps removed from the economic sector affected by the alleged antitrust violation. The area of the economy most directly affected is contracting and subcontracting in the construction industry, which impacts upon unionized subcontractors. The next economic sector affected is employment opportunities for the employees of the unionized subcontractors. The Unions are, at best, tertiary victims which will suffer damage only through loss of membership or loss of dues, if employees move into the nonunion market.

VI

ARGUMENT

A. The Acts Alleged by the Unions Do Not Constitute a Restraint of Trade Within the Meaning of the Sherman Act

The charging allegations of the Complaint can be grouped into four general categories:

1. Breach of collective bargaining agreements. [R. 370]

2. Inducing and encouraging other parties to hire subcontractors and contractors who are not parties to collective bargaining agreements with the plaintiffs, and encouraging and inducing non-defendants to refrain from entering into collective bargaining agreements with plaintiffs. [R. 369]

3. Operating so-called "double-breasted" businesses, with unionized and non-union divisions. [R. 369]

4. Holding "open-shop" meetings to advocate and encourage non-union operations. [R. 369]

Though the Unions have expansively characterized these charges as constituting a "restraint of trade" in violation of section one of the Sherman Act, 15 U.S.C. §1, a careful analysis of plaintiffs' allegations demonstrates that these allegations fall outside the purview of the Act. None of the features of a "restraint of trade," as that term has been interpreted, are present in these claims.

Section one of the Sherman Act condemns "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ." 15 U.S.C. §1.

The nebulous language of the statute has made it necessary for the courts to play the leading role in determining the scope of the proscription upon restraints of trade.[5]

Since virtually every commercial agreement "restrains" trade in some manner, this Court has repeatedly rejected the proposition that every arguable "restraint" falls within the scope of the Act:

> "[A]s the acts which may come under the classes stated in the 1st section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the act."

Standard Oil Co. v. United States, 221 U.S. 1, 63, 31 S.Ct. 502, 517 (1911).

Instead, the Supreme Court has limited the application of the Act to unreasonable restraints analogous to those condemned by common law:

> "This Court has since repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms are only those which are comparable to restraints deemed illegal at common law . . . ."

Apex Hosiery Co. v. Leader, 310 U.S. 469, 498, 60 S.Ct. 982, 995 (1940).

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[5] In *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489, 60 S.Ct. 982, 989 (1940) (footnote omitted), the Court noted:

> "The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute . . . ."

The *Apex* case contains a valuable discussion of the types of "restraint" which the courts have found to be within the scope of the Sherman Act:

> "The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before enactment of the Sherman law. They were contracts for the restriction or suppression of competition *in the market*, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, *which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market* . . . .
>
> "In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concentrated commercial power of 'trusts' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states."

Apex Hosiery Co. v. Leader, 310 U.S. at 497-98, 60 S.Ct. at 994-95 (1940) (footnote omitted; emphasis added).

Apex clearly holds that the *sine qua non* of a "restraint of trade" is some showing of an injury to competition in the marketing of goods and services:

> "[The Sherman Act] was enacted in the era of 'trusts' and of 'combinations' of business and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to

> restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury. . . .
>
> "*[T]his Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities unless the Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods or services* . . . ."

310 U.S. at 492-93, 495, 60 S.Ct. at 992, 993 (1940) (footnote omitted; emphasis added).[6]

Under *Apex*, it makes no difference whether the alleged miscreant is an employer or a union:

> "[Chief Justice] Stone was careful to say [in *Apex*], however, that his test did not vary depending on the nature of the alleged wrongdoer, whether union or management. The *Apex Hosiery* approach was not a matter of a statutory union exemption; the Sherman Act, as written, would simply not apply to a certain class of restraints. Employers, or employers in combination with unions, would presumably be as free as unions acting alone to halt competition grounded in wage differentials. In short, the Sherman Act would be confined to restraints on the product market, and the labor market would be beyond its ken."

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[6] This Court's opinion in *Apex* was followed five years later by *Hunt v. Crumboch*, 325 U.S. 821, 65 S.Ct. 1545 (1945), in which the Court affirmed a lower court decision dismissing a Sherman Act claim against union members, who allegedly refused to work for an employer out of motives of personal animosity, thereby driving the employer out of business. The Court, speaking through Mr. Justice Black, noted:

> "The controversy in the instant case, between a union and an employer, involves nothing more than a dispute over employment, and the withholding of labor services. It cannot therefore be said to violate the Sherman Act, as amended. That Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."

325 U.S. at 826, 65 S.Ct. at 1548.

St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603, 606 (1976) (footnotes omitted).

In the case at bar, the plaintiff Unions are unhappy because the defendants allegedly have been using and encouraging others to use non-union labor. If these claims are true, then, potentially, the Unions may be able to demonstrate that defendants violated the federal labor laws.[7] But nothing in the Complaint suggests that the defendants are applying direct restraints to the market for goods and services.

The defendants do not question the rule that parties to a labor agreement, including unions, may violate the antitrust laws when they create union-employer combinations which impermissibly restrain competition. *See, e.g., Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 95 S.Ct. 1830 (1975); *United Mine Workers v.*

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[7] Changes of corporate name and status and the creation of "double-breasted" contracting situations [R. 369] can be challenged under section 8(a)(5) of the National Labor Relations Act, (NLRA) 29 U.S.C. §158(a)(5), as a refusal to bargain in good faith. *See Associated General Contractors of California, Inc. v. NLRB*, 633 F.2d 766, 771 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S.Ct. 3049 (1981). These acts can also be challenged under the arbitration provisions of the Master Labor Agreement, which require all disputes concerning matters arising under the agreement to be resolved thereunder. Finally, such conduct can also be challenged in a lawsuit in federal court under section 301 of the Labor Management Relations Act of 1947, as amended (LMRA), 29 U.S.C. §185.

The allegations that defendants "encouraged" and "coerced" non-parties to refuse to enter into collective bargaining relationships with the Unions and to grant construction contracts to non-union contractors [R. 369] could be challenged as unfair labor practices under section 8(a)(1) of the NLRA, 29 U.S.C. §158(a)(1). These acts, together with the "open-shop"seminar allegations [R. 369-70], could also be challenged under the arbitration clause of the Master Labor Agreement, as acts designed to subvert the collective bargaining relationship of the parties.

Lastly, the allegation that the AGC and its members breached their collective bargaining agreements with the Unions [R. 370] obviously state a claim which can be prosecuted under the arbitration provisions of the Master Labor Agreement and under the provisions of section 301 of the LMRA.

Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965); In this case, however, the complaint contains no allegations establishing a union-employer conspiracy.

This Court has previously recognized that a *union's* unilateral effort to secure uniform wage and employment terms from employers is exempt from the antitrust laws, even though such a course of conduct may have far-reaching economic implications:

> "Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union."

United Mine Workers v. Pennington, 381 U.S. at 665 n.2, 85 S.Ct. at 1591 n.2 (1965). The same rule necessarily applies to employer conduct.

Nearly the same allegations as are presented in the instant case were before the Fifth Circuit Court of Appeals in *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801, 92 S.Ct. 21 (1971).

In the *Prepmore* case, a union attempted to state a cause of action under section one of the Sherman Act in the following terms:

> "Prepmore and two of its officers conspired with an out of state company, Blue Bell, Inc., and its president Caddo . . . to injure the union and destroy its operations in Russellville. This was done through a refusal to deal with the union concerning wage rates and working conditions. Blue Bell agreed to aid Prepmore in hindering and preventing the union from carrying on its lawful business of representing the employees at the Prepmore plant."

431 F.2d at 1006. The Fifth Circuit Court of Appeals sustained the dismissal of the antitrust claim, reasoning as follows:

> "We affirm the dismissal of the Sherman Act claim (Count I), on the a fortiori teachings of *Apex Hosiery Co. v. Leader*. . . .
>
> "The facts here go to a refusal to deal with the union with respect to conditions of employment, ordinarily a violation of §8(a)(5) of the National Labor Relations Act, 29 U.S.C.A. §158(a)(5). There is no indication, however remote, of a conspiracy or combination on the part of Prepmore and Blue Bell to restrain competition in the marketing of Prepmore's goods. In sum, the allegations of the first count of the counterclaim do not rise to the level of alleging a restraint of the type to which the Sherman Act is directed. . . ."

431 F.2d at 1007 (footnote and citations omitted).

The *Prepmore* decision is significant because it emphasizes, as does *Apex*, a critical limitation on the application of the Sherman Act. Only those disputes which have some significant, direct impact on competition in the sale of goods or services come within the purview of the Sherman Act.

In cases such as this one, where the gravamen of the Complaint is not an active market restraint but, rather, a labor grievance, the courts have consistently refused to find a violation of the Sherman Act.[8]

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[8] Prior court of appeals and district court cases have held that acts undertaken by employers acting collectively in a labor context without the participation of labor groups are not properly the subject of the antitrust laws. *See Amalgamated Meat Cutters v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979) (employers' anti-union activities during a strike did not give rise to a claim under section 1 of the Sherman Act); *United Brick & Clay Workers v. Junction City Clay Co.*, 158 F.2d 552 (6th Cir. 1946) (employer conspiracy directed against a union and its members did not state claim under section 1 of the Sherman Act); *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298 (E.D. Wash. 1981) (multi-employer association and its members did not violate federal antitrust laws by engaging in a lockout and other

(footnote continued on following page)

Moreover, a labor grievance cannot be transformed into an antitrust case by the mere use of the phrase "restraint of trade" to describe the dispute. Thus, in *Kennedy v. Long Island Railroad*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830, 84 S.Ct. 75 (1963), the court dismissed an action by a labor union against railroads for damages allegedly sustained by the entry of the railroads into a "strike insurance plan." The union claimed that the plan constituted a boycott and restraint of trade in violation of the Sherman Act. The court rejected the contention, reasoning as follows:

> "We next address ourselves to appellants' assertions that the strike insurance plan constitutes a *per se* violation of the Sherman Act and of a similar but more specific proscription within the Interstate Commerce Act. These assertions must also fail, for the fundamental reason that *the named statutes were designed principally to outlaw restraints upon commercial competition in the marketing and pricing of goods and services and were not intended as instruments for the regulation of labor-management relations*."

Id. at 372-73 (emphasis added).

The Courts have refused to permit a union to contrive a purported market restraint by alleging that a labor grievance will result in some indirect effect on the price of labor in the market. Thus, in the *Kennedy* decision, the Second Circuit Court of Appeals specifically rejected the union's contention that the case was properly a Sherman Act vio-

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concerted activity); *Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 511 F. Supp. 509 (E.D. La. 1981) (employer conspiracy to commit unfair labor practices did not state a claim under the Sherman Act); *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*, 475 F. Supp. 482 (S.D.N.Y. 1979), *appeal dismissed as moot*, 638 F.2d 7 (2d Cir. 1980) (conspiracy between a corporate conglomerate and other non-union parties to injure a union did not state a claim for relief under the Sherman Act); *Clune v. Publishers' Association*, 214 F. Supp. 520-21 (S.D.N.Y. 1963), *aff'd mem.*, 314 F.2d 343 (2d Cir. 1963) (anti-union concerted activity (a lockout) carried out by members of Publishers Association did not form basis for claim for relief under the Sherman Act).

lation because of the effect of the railroad's acts on the cost of labor, reasoning as follows:

> "Appellants urge, however, that the price of *labor* [emphasis in original] is artificially manipulated whenever a railroad is permitted to avail itself of the proceeds of strike insurance. The answer lies in the clear language of section 6 of the Clayton Act, 15 U.S.C. §17: 'The labor of a human being is not a commodity or article of commerce.' As an outstanding scholar in the field of labor law has noted: '*No one seriously suggests that anti-trust policy should be concerned with the labor market per se.*' Cox, 'Labor and the Antitrust Laws — A Preliminary Analysis,' 104 U. of Pa. L. Rev. 252, 254 (1955)."

319 F.2d at 373 (footnote omitted; emphasis added).

Similarly, in *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*, 475 F. Supp. 482 (S.D.N.Y. 1979), *appeal dismissed as moot*, 638 F.2d 7 (2d Cir. 1980), a union brought an action against an employer alleging that it had conspired with manufacturers, trade associations, and various governmental officials to frustrate the organizational and representational activities of the union. The complaint alleged twenty separate categories of anti-union acts, including several categories similar to those set forth in the Unions' Complaint herein. The district court dismissed the action, finding that the union's claims were matters subject to regulation under federal labor law, and that the intrusion of antitrust doctrines into this regulatory scheme would be contrary to congressional intent. Relying upon this Court's decision in *Apex Hosiery*, the district court stated:

> "I fully appreciate the difficulties ACTWU has encountered in bringing Stevens, that 'notorious recidivist,' to book by appealing to the labor laws and the NLRB . . . [, but] the problem may not legitimately be solved by reference to another body of law which is simply not applicable."

475 F. Supp. at 490 (footnote omitted).

The rationale of the *Apex Hosiery* case and its progeny has been recognized repeatedly in the Ninth Circuit. For example, in *Schatte v. International Alliance of Theatrical Stage Employees,* 182 F.2d 158 (9th Cir.), *cert. denied,* 340 U.S. 827, 71 S.Ct. 64 (1950), the trial court dismissed an action brought by a labor union, claiming a purported conspiracy between a rival union and certain studios to violate written collective bargaining agreements and to refuse to hire carpenters who worked under such agreements. The Ninth Circuit Court of Appeals affirmed, finding that no cause of action under the antitrust laws had been stated. The court reasoned:

> "The Complaint alleges that appellees compelled minor studios, competitors of employer appellees, to employ allegedly less efficient members of the I.A.T.S.E. in place of the allegedly more efficient members of appellants' union, with the intent and effect of increasing the production costs of such competitors, and of ultimately driving the competitors out of business and enabling employer appellees to increase the price of their products. . . . [T]hese alleged acts do not constitute a violation of the anti-trust laws. This is made clear by the Supreme Court in *Apex Hosiery Co. v. Leader,* in a detailed discussion of the types of acts which constitute restraints of trade within the contemplation of those laws. It is there pointed out that the term 'restraint of trade' in the anti-trust laws is to be given the meaning which the phrase had at common law, and that '[the Supreme] Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities unless the Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods or services . . . .' *Compelling others to adopt*

> *certain employment policies is not a restraint upon commercial competition in this sense.*"

182 F.2d at 167 (citations omitted; emphasis added).

Petitioner has no quarrel with cases holding that a union may state an antitrust claim against an employer and a rival "sweetheart" union which combined to drive the plaintiff union out of business to further the mutual economic advantage of the union and employer conspirators. *See International Association of Heat & Frost Insulators v. United Contractors Association, Inc.*, 483 F.2d 384 (3d Cir. 1973), *modified*, 494 F.2d 1353 (3d Cir. 1974) (creation of "sham" unions, which entered into collective bargaining agreements with employers in an effort to drive the plaintiff unions out of business, may state a Sherman Act claim); *Carpenters District Council v. United Contractors Association of Ohio, Inc.*, 484 F.2d 119 (6th Cir. 1973), *modified*, 539 F.2d 1092 (6th Cir. 1976) (same). Nor does petitioner disagree with the proposition that a union is a business which is capable of suffering economic injury. *See Amalgamated Clothing & Textile Workers Union v. J. P. Stevens & Co.*, 475 F.Supp. 482, 487 (S.D.N.Y. 1979).

Here, however, the alleged Sherman Act violation arises from the unilateral effort of a multiemployer association and its members to implement subcontracting policies, and encourage others to adhere to the same policies, which entailed the use of non-union subcontractors. Such conduct is directly regulated by federal labor laws, and is not subject to antitrust analysis.

Of course, any labor policy adopted by a multiemployer association and its members which discourages the use of union labor or the subcontracting of work to unionized employers will necessarily impact a union's effectiveness. If that were all that was required to state a Sherman Act claim, then *any* anti-union conduct, including employer lockouts, bad faith bargaining, or "surface" bargaining, would be a potential basis for a Sherman Act suit brought by a union against a multiemployer group. To state this proposition is to make its absurdity obvious. Moreover, many types of anti-union conduct in which employers may engage (such as lockouts) are explicitly sanctioned by federal labor law.[9]

Exposing a multiemployer association and its members to antitrust liability for unilateral conduct in a collective bargaining context will open a "pandora's box" of unresolved issues. For example, is employer "group boycott" conduct, which also constitutes an unfair labor practice, *per se* illegal under the antitrust laws, or is it subject to a "rule of reason" analysis?[10] *Compare Consolidated Express, Inc. v. New York Shipping Association, Inc.*, 602 F.2d 494, 522-24 (3d Cir. 1979) ("secondary boycott" conduct of collective bargaining parties was a *per se* violation of the Sherman Act), *vacated and remanded sub nom, International Longshoremen's Association v. Consolidated Express, Inc.*, 448 U.S. 901, 100 S.Ct. 3040 (1980), *with Commerce Tankers Corporation v. National Maritime Union*, 553 F.2d 793, 802 (2d Cir.) ("substantial question" as to whether *per se* approach under antitrust laws is applicable in the case of non-exempt labor activity), *cert. denied*, 434 U.S. 923, 98 S.Ct. 400 (1977). It should be abundantly clear that exposing the relationship between collective bargaining parties, traditionally regulated by federal labor laws, to "boycott" claims under the Sherman Act could give birth to doctrines at variance with settled labor policies, and invite unnecessary litigation in an area already adequately policed by federal law.

In the past, this Court has demonstrated sensitivity to the reality that federal antitrust laws may clash with other federally sanctioned interests, and that the courts must necessarily reach an accommodation between the conflicting policies. For example, in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961), the Court refused to entertain a claim that the defendants had conspired to "restrain trade" by engaging in lobbying activities before state legislatures, finding these activities to be protected by the strong public policy in favor of freedom of petition. In its unanimous opinion, this Court held that the Sherman Act "is a code that condemns trade restraints, not political activity." 365 U.S. at 140, 81 S.Ct. at 523.[11] By parity of reasoning with *Noerr*, the claims raised by the Unions here should be found to be outside the ambit of the Sherman Act.

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[9] *See* Part E of Argument, *infra*.

[10] Although it did not address this issue, the Ninth Circuit cited and relied upon cases in which group boycotts were held illegal *per se*. 648 F.2d at 531 n. 5.

B. The Ninth Circuit Erroneously Applied a "Group Boycott" Label to Defendants' Conduct

The Ninth Circuit found that the Unions had stated a claim under section one of the Sherman Act by virtue of their allegation that "members of the AGCC coerced and aided each other to subcontract only with subcontractors who had not signed with the Unions." 648 F.2d at 531. The panel reasoned that "the situation described by these allegations is very similar to a concerted refusal to deal, or a group boycott, which have both been held to constitute Sherman Act violations." *Id.*[12]

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[11] *See also Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1256 (1963).

[12] While accusing the trial court of misreading the Complaint, 648 F.2d at 531, the Ninth Circuit *adds* significant terms to the Complaint which do not appear anywhere in the pleading itself. The court thrice characterizes the Unions' claim as one involving a "boycott," although this term does not appear in the Complaint. The court also says that the Unions "allege that members of the AGCC coerced and aided each other to subcontract *only* with subcontractors who had not signed with the Unions." *Id.* Significantly, the Unions' Complaint nowhere asserts that the defendants were subcontracting or coercing others to subcontract *only* with non-union subcontractors; the whole point of the Unions' lawsuit is that the defendants' dealing with *any* non-union subcontractors is objectionable (to the Unions). Ironically, the court of appeals opinion notes the impropriety of "overstepping the boundaries of the complaint, which federal courts are precluded from doing when ruling on motions to dismiss." *Id.*

In support of this conclusion, the Ninth Circuit cites a line of cases outside the labor context in which group boycotts, organized by commercial competitors to preserve a market to themselves, have been held to constitute a *per se* violation of the Sherman Act. *See, e.g., American Medical Association v. United States*, 317 U.S. 519, 63 S.Ct. 326 (1943); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 61 S.Ct. 703 (1941); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 51 S.Ct. 42 (1930).

These cases are simply not apposite to the facts alleged in the present case. Because they arose outside the collective bargaining context, these cases did not raise the conflict between the regulation of conduct by federal labor law and antitrust law.

The one decision cited by the Ninth Circuit in which a collective bargaining agreement was involved, *United States v. Women's Sportswear Manufacturing Association*, 336 U.S. 460, 69 S.Ct. 714 (1949), is a case in which the trial court found that exclusionary provisions were inserted in a collective bargaining agreement solely at the instance of the employers, for their own unilateral purposes, which were extrinsic to the collective bargaining relationship.

This Court has previously held that certain types of commercial boycotts may be *per se* violations of section one of the Sherman Act. *See, e.g., Radiant Burners, Inc. v. People's Gas, Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705 (1959).

However, the Court has made it clear that not every activity which can be characterized as a "boycott" is *per se* illegal under the antitrust laws.

For example, in *Klor's*, this Court noted that Sherman Act proscriptions are "aimed primarily at combinations having commercial objectives and [are] applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." 359 U.S. at 213 n.7, 79 S.Ct. at 710 n.7.[13]

Following the dicta laid down by this Court in *Klor's*, circuit courts, including the Ninth Circuit, have held that various types of "boycotts" do not create a right of recovery under the Sherman Act. *See, e.g., Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376 (9th Cir. 1981); *Borger v. Yamaha International Corp.*, 625 F.2d 390 (2d Cir. 1980); *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Ackerman-Chillingworth v. Pacific Electrical Contractors Association*, 579 F.2d 484 (9th Cir. 1978), *cert. denied*, 439 U.S. 1089, 99 S.Ct. 872 (1979); *Alpha Distributing Co. v. Jack Daniel Distillery*, 454 F.2d 442 (9th Cir. 1972), *cert. denied*, 419 U.S. 842, 95 S.Ct. 74 (1974).

The use of the "group boycott" rubric by the Ninth Circuit is especially inappropriate in a suit between parties to an ongoing collective bargaining relationship. The federal labor laws authorize numerous types of conduct involving "refusals to deal," which would be illegal in a non-labor context. For example, under section 6 of the Clayton Act, 15 U.S.C. §17, the collective organization of workers and their refusal to deal with employers who fail to reach agreement with their designated collective bargaining representative is a legislatively protected form of concerted activity. Similarly, collective bargaining parties are permitted to enter into collective bargaining agreements which limit the right of the employer to subcontract (and which thereby "boycott" the parties with which the employer may *not* subcontract). Moreover, this Court has held that the issue of subcontracting bargaining unit work is a mandatory subject of collective bargaining. *See Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 85 S.Ct. 398 (1964).

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[13] The disutility of a *per se* rule governing conduct which might be characterized as a "group boycott" has been the subject of much commentary. *See, e.g.*, Bauer, *Per Se Illegality of Concerted Refusals To Deal: A Rule Ripe For Reexamination*, 79 Colum. L. Rev. 685 (1979); Rahl, *Per Se Rules and Boycotts Under The Sherman Act: Some Reflections On the Klor's Case*, 45 Va. L. Rev. 1165 (1959); Bird, *Sherman Act Limitations On Non-Commercial Concerted Refusals To Deal*, 1970 Duke L.J. 247 (1970); McCormick, *Group Boycotts — Per Se or Not Per Se*, 7 Seton Hall L. Rev. 703 (1976); Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 Harv. L. Rev. 1531 (1958).

Employers enjoy similar protection under federal labor law. This Court has specifically endorsed the concept of multiemployer collective bargaining units. *See Charles D. Bonanno Linen Service, Inc. v. NLRB*, ___ U.S. ___, 50 U.S.L.W. 4087 (1982); *NLRB v. Truck Drivers Local 449* (*"Buffalo Linen"*), 353 U.S. 87, 77 S.Ct. 643 (1957). As a concomitant, lockouts and other concerted activities utilized by an employers' association and its members to support their position in collective bargaining are a form of conduct protected under federal labor law and are not actionable. *See NLRB v. Brown*, 380 U.S. 278, 85 S.Ct. 980 (1965); *Clune v. Publishers' Association*, 214 F. Supp. 520, 527 (S.D.N.Y.), *aff'd mem.*, 314 F.2d 343 (2d Cir. 1963); *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298 (E.D. Wash. 1981).[14]

Given the federal sanction for multiemployer bargaining and collective employer action to sustain the multiemployer unit's position in collective bargaining,[15] it makes no practical sense to permit a union to maintain a cause of action against such a multiemployer unit and its members on a "group boycott" theory. Permitting a union to maintain such a claim grants the union an economic and legal weapon which the employers do not possess.[16] Under the Ninth Circuit's holding, employers will be vulnerable to Sherman Act claims any time a union becomes displeased with the subcontracting policy adopted by the multiemployer bargaining unit's members. Such a rule would throw the balance of labor and employer interests in collective bargaining relationships seriously out of balance.

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[14] Commentators have also recognized that employers must have a right to cooperate, in the multiemployer context, in the formulation of labor policy. *See generally* Note, *Cooperative Collective Bargaining Conduct Among Trade Competitors and the Non-Statutory Labor Exemption from Antitrust Liability*, 9 Rutgers-Camden L.J. 477, 497 (1978).

[15] As this Court noted in *United Mine Workers v. Pennington*, 381 U.S. 657, 665, 85 S.Ct. 1585, 1590 (1965):

> "Unquestionably the Board's demarcation of the bounds of the duty to bargain has great relevance to any consideration of the sweep of labor's antitrust immunity, for we are concerned here with harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting 'the peaceful settlement of industrial disputes by subjecting labor management controversies to the mediatory influence of negotiation.' *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211, 85 S.Ct. 398, 403."

C. The Ninth Circuit Has Misapplied This Court's Holding in Connell Construction

In *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 95 S.Ct. 1830 (1975), this Court found that a union's agreement with a contractor whose employees it did not seek to represent, which would require the contractor to subcontract work only to specified unionized subcontractors, was subject to scrutiny under the antitrust laws. Though many questions remain unanswered about the *Connell* decision, the lower court cases which have followed appear to be virtually unanimous in their perception that the Court found the absence of a collective bargaining relationship between the union and Connell to be critical.[17] *See, e.g., Larry V. Muko, Inc. v. Southwestern Pennsylvania Building & Construction Trades Council*, 609 F.2d 1368, 1373 (3d Cir. 1979) (*en banc*); *California Dump Truck Owners Association, Inc. v. Associated General Contractors of America*, 562 F.2d 607, 611-14 (9th Cir. 1977);

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[16] Unions and their members are exempt from liability under federal antitrust law, except in those cases where they combine with non-union interests to impose direct restraints upon a product market. *See Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 95 S.Ct. 1830 (1975); *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 65 S.Ct. 1533 (1945).

[17] In *Connell*, the Court noted: "There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement. In this case, Local 100 had no interest in representing Connell's employees." 421 U.S. at 626-27, 95 S.Ct. at 1836-37 (citations omitted).

Carpenters Local 1846 v. Pratt-Farnsworth, Inc., 511 F. Supp. 509, 517-18 (E.D. La. 1981).

In the present action, unlike *Connell*, the named parties have a long-standing collective bargaining relationship. Each of the alleged anticompetitive acts of the defendants was carried out, according to plaintiffs, pursuant to a "plan, scheme, agreement and conspiracy, knowingly, willfully and maliciously, whose purpose and ends are to abrogate, destroy, undermine and weaken the collective bargaining relationship between plaintiffs and each of them and defendants and each of them . . . ." [R. 368]

The Ninth Circuit appears to have completely ignored the distinction between a claim which arises between parties to an ongoing collective bargaining relationship and one which arises between a union and a stranger contractor.

The relations between the collective bargaining parties are subject to close regulation under federal labor law, and the Unions have a number of remedies available to redress proscribed conduct. Many of the remedies which are available to an employer or a contractor against the party with which it has a collective bargaining relationship are not available outside the labor relations context.

Moreover, as the district court below noted, this Court's opinion in *Connell* emphasizes the congressional condemnation of "top down" organizing by unions. 421 U.S. at 631, 95 S.Ct. at 1840. The Complaint filed by the Unions seems to be calculated to achieve the very goal which the Unions claim the contractors are frustrating in the present action: subcontracting only to those employers who have collective bargaining agreements with the Unions.

Finally, it must be noted that employers, like anyone else, have First Amendment rights of free speech and association, which permit them to advocate "open shop" construction, use of non-union labor, and other policies inimical to organized labor. This Court has previously recognized that the rights of free speech and petition may outweigh the proscriptions of the Sherman Act, where application of the Sherman Act would threaten the exercise of these fundamental constitutional rights. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961).

D. The Ninth Circuit's Decision Creates Inconsistent Rules and Remedies to Govern Labor Conduct

In its opinion, the Ninth Circuit noted that the conduct alleged in the Complaint "might also have provided a basis for unfair labor practice proceedings under §8(a)(1) and 8(a)(3) of the National Labor Relations Act (NLRA)." 648 F.2d at 532 n.6. The court of appeals quoted this Court's language in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 636 n.17, 95 S.Ct. 1830, 1841 n.17 (1975), suggesting that "where there is an independent federal remedy that is consistent with the NLRA, the parties may have a choice of federal remedies." Implicit in the Ninth Circuit's decision are findings (1) that the remedies provided by the antitrust laws and the remedies provided by the labor laws are consistent and (2) that the Unions therefore have a choice of federal remedies.

A comparison of the remedies provided by the antitrust laws and the national labor laws and a careful reading of the Court's language in *Connell* do not support either of the Ninth Circuit's conclusions.

There is nothing "consistent" about the remedies which the Unions seek to invoke under the Sherman Act, and those which would be available to plaintiffs under section 301 of the Labor Management Relations Act and section 8 of the National Labor Relations Act.

Section 4 of the Clayton Act, 15 U.S.C. §15, provides that a successful plaintiff prosecuting a Sherman Act claim shall be awarded treble the amount of his actual damages, plus his attorneys' fees.[18] The treble damages provided under section 4 are a form of punitive or exemplary damages, designed to deter further anticompetitive conduct. *Kline v. Coldwell Banker & Co.*, 508 F.2d 226, 235 (9th Cir. 1974).

By contrast, section 301 of the LMRA, 29 U.S.C. §185, which provides the jurisdictional basis for the Unions' claim that defendants have breached their collective bargaining obligations, provides for no automatic award of punitive or exemplary damages. Exemplary damages may be awarded under section 301 only in extraordinary cases. *See Hotel & Restaurant Employees v. Michelson's Food Services, Inc.*, 545 F.2d 1248, 1254 (9th Cir. 1976); *Navios Corp. v. National Maritime Union*, 236 F. Supp. 657, 662-63 (E.D. Pa. 1964), *aff'd per curiam*, 359 F.2d 852 (3d Cir.), *cert. denied*, 385 U.S. 900, 87 S.Ct. 205 (1966). Section 301 also does not permit an award of attorneys' fees. *General Telephone Co. v. IBEW*, 554 F.2d 985, 987 (9th Cir. 1977).

Similarly, the NLRA does not make any provision for the award of punitive damages for unfair labor practices; indeed, the cases appear to have been unanimous in holding that the National Labor Relations Board's power is limited to the fashioning of "make whole" remedies. *See, e.g., Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-11, 61 S.Ct. 77, 78-79 (1940); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198, 61 S.Ct. 845, 854 (1941) ("only actual losses should be made good").

Given the wide divergence between the remedies available to a successful plaintiff under the Sherman Act and those available to a plaintiff under the federal labor laws, it is difficult to understand the Ninth Circuit's assertion that such remedies are "consistent" and that the Unions should have a choice of theories on which to proceed.[19]

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[18] Trebling the damage award is mandatory. *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 878 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020, 91 S.Ct. 582 (1971).

The opinion of the court of appeals also elevates the dictum in *Connell* to the status of a holding. This Court did not state that parties *do* have a choice of federal remedies; the Court merely suggested that the parties *may* have a choice of remedies.

Even if the antitrust remedies and labor remedies are found to be consistent, there are good reasons for holding that the parties do not have a choice of remedies. The Court has repeatedly emphasized the importance of preserving the intricate and delicate statutory scheme which Congress has devised for the regulation of labor relations. *See Amalgamated Association of Street Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909 (1971); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959).[20] The award of treble damages is a drastic remedy, designed as an enforcement tool for the hands of private enterprise to regulate commercial abuses in the marketing of goods and services. The carefully balanced federal labor relations mechanism will be thrown into disarray by thrusting the treble damage remedy into the balance.

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[19] Courts and commentators alike have noted the competing and conflicting policies of the antitrust laws and the labor laws. In *Consolidated Express, Inc. v. New York Shipping, Inc.*, 452 F. Supp. 1024, 1029 (D.C.N.J. 1978), the court observed: "It is commonplace that the antitrust laws and the labor laws are antithetical." One commentator has stated that antitrust policy and labor policy are "intrinsically incompatible." St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603, 604 (1976). Professor Cox has written: "No one seriously suggests that antitrust policy should be concerned with the labor market per se." Cox, *Labor and the Antitrust Laws — A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 254 (1955). This Court has observed that the antitrust laws and labor laws embody "two declared congressional policies which it is our responsibility to reconcile." *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 806, 65 S.Ct. 1533, 1538 (1945).

[20] This Court has permitted common law remedies to be applied to claims arising in labor disputes which are "peripheral" to the concerns of federal labor law. *See Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745 (1978); *Farmer v. Carpenters*, 430 U.S. 290, 97 S.Ct. 1056 (1977); *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657 (1966). However, in this action, no such competing local interest is involved. Rather, the Unions are attempting to utilize a federal remedy developed to regulate business competition to resolve a labor dispute.

E. The Ninth Circuit Incorrectly Analyzed the Statutory Labor Exemption

Section 20 of the Clayton Act, 29 U.S.C. §52, provides:

> "No restraining order or injunction shall be granted by any court of the United States . . . in any case . . . between employers and employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment . . . .
>
> "[N]o restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from . . . ceasing to . . . employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; . . . nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

The acts which the Ninth Circuit found potentially violative of the Sherman Act (the refusal to let subcontracts to unionized subcontractors, and the encouragement or "coercion" of others to do so) seem clearly to fall within the broad spectrum of acts immunized from legal action by section 20 of the Clayton Act.

The Ninth Circuit, however, held that section 20 could afford AGC and its members no protection, because such protection "would be totally inconsistent with the pro-labor purpose for which section 20 was enacted." 648 F.2d at 533.

Other circuit courts and district courts have disagreed with this holding, finding that section 20 does immunize concerted employer activity within the labor context. *See*

Amalgamated Meat Cutters, Local 576 v. Wetterau Foods, Inc., 597 F.2d 133, 136 (8th Cir. 1979); *Kennedy v. Long Island Railroad*, 319 F.2d 366, 372 (2d Cir.), *cert. denied*, 375 U.S. 830, 84 S.Ct. 75 (1963); *Clune v. Publishers' Association*, 214 F. Supp. 520, 528 (S.D.N.Y.), *aff'd mem.*, 314 F.2d 343 (2d Cir. 1963).[21] The principle is well stated in *United States v. San Francisco Electrical Contractors Association*, 57 F. Supp. 57, 60-61 (N.D. Cal. 1944) (citations omitted):

> "Workmen have the right to organize.
>
> "Employers may combine for the mutual protection of their interests. Employers and employees may bargain collectively. They may, in so doing, or in enforcing their demands, by strikes, lockouts, restrictions on the use of men or equipment, affect the flow of goods in interstate commerce.
>
> "But all the late decisions agree that, in the light of the Clayton and the Norris-LaGuardia Acts, such results are not the direct interference with interstate commerce which the Sherman Antitrust Act forbids."[22]

In support of its assertion that section 20 cannot protect concerted conduct of employers, the Ninth Circuit panel relies primarily upon *Allen Bradley Co. v. Local 3, IBEW*,

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[21] The evenhanded nature of the statutory antitrust exemption was recognized in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488, 41 S.Ct. 172, 184 (1921), where Mr. Justice Brandeis, in dissent, referred to the "right of industrial combatants to push their struggle to the limits of the justification of self-interest . . . ." Clearly, Justice Brandeis was referring to the combatants on *both* sides of a labor dispute.

[22] Commentators have also noted the apparent applicability of the statutory immunity to employers:

> "Section 20 of the Clayton Act also implied that employers were to enjoy rights to concerted action parallel to those of employees. Although §6 of the Clayton Act did not expressly mention employer associations, the pertinent legislative history reinforces the foregoing implication. See 51 Cong. Rec. 14333-34, 14336 (1914)."

Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. Chi. L. Rev. 659, 672 n.53 (1965).

325 U.S. 797, 65 S.Ct. 1533 (1945). *Allen Bradley*, however, did not involve unilateral concerted activity by employers in a collective bargaining context. Rather, *Allen Bradley* involved a combination of unions and employers in a broad conspiracy to fix prices and allocate markets in the New York City area. This Court held that the employers in *Allen Bradley* could not shield themselves from liability for these anticompetitive acts merely because unions participated in the illegal conduct. Nothing in the *Allen Bradley* opinion supports the Ninth Circuit's belief that the exemption provided by section 20 is unavailable to employers' groups acting unilaterally in formulating and carrying out labor relations policies, and encouraging others to follow the same policies.

This Court has never squarely addressed the issue of the application of the statutory antitrust exemption to employers. However, at least three previous members of the Court have indicated a clear understanding that the antitrust exemption extends to employers as well as unions:

> "[M]y conclusion that unions *and employers* are exempt from the operation of the antitrust laws for activities involving subjects of mandatory bargaining is based solely on congressional statutes which I believe clearly grant such an exemption . . . ."

United Mine Workers v. Pennington, 381 U.S. 676; 735, 85 S.Ct. 1607, 1627 (1965) (opinion of Goldberg, J., joined by Harlan and Stewart, J.J.) (emphasis added).

Both the statutory and non-statutory exemptions implicitly recognize that there is a sphere of protected labor-related activity which must be controlled exclusively by federal labor law and must therefore be exempt from attack under federal antitrust law, state antitrust law, and common law tort doctrines. Otherwise, the balance between union and employer rights under federal labor laws would be thrown widely out of balance.

It is abundantly clear from the language of Clayton Act section 20, 29 U.S.C. §52, and Norris-LaGuardia Act sections 4 and 13, 29 U.S.C. §§104, 113, that the statutory exemption applies to at least *some* acts of employers acting alone or together with other employers in connection with a "labor dispute." For example, Norris-LaGuardia Act section 4(b) exempts "becoming or remaining a member of any labor organization *or of any employer organization*." 29 U.S.C. §104(b) (emphasis added). *See also* Norris-LaGuardia Act §3, 29 U.S.C. §103 (promise not to become a member of a labor organization or an *employer organization* not enforceable).[23]

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[23] Section 4 of the Norris-LaGuardia Act, 29 U.S.C. §104, deprives U.S. courts of jurisdiction to issue any injunctive order "in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization . . .;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

. . .

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute,

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified; and

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . ."

Without discussion or analysis, the Ninth Circuit dismissed the possibility that section 4 might immunize some of the acts alleged in this case. 648 F.2d at 535. For example, the "coercion" of owners and letters of construction contracts to use non-union subcontractors might well be characterized as "advising, urging, or otherwise causing or inducing" persons from "ceasing or refusing to perform any work or to remain in any relation of employment." 29 U.S.C. §104(i) & (a). The panel refused to consider the possibility that these provisions of the Norris-LaGuardia Act might preclude federal courts from granting relief.

Similarly, section 20 of the Clayton Act provides that any "person or persons"[24] may cease "to employ" any party to a labor dispute, clearly giving a prerogative to *employers*. Furthermore, section 13(a)(2) of the Norris-LaGuardia Act provides that a case "*shall be held to involve or grow out of a labor dispute*" even if it is "*between one or more employers or associations of employers and one or more employers or associations of employers.*" 29 U.S.C. §113(a)(2) (emphasis added). The majority opinion erroneously holds that the statutory exemption does not protect employers.

A careful analysis of the statutory language of Clayton Act section 20 and Norris-LaGuardia Act sections 4 and 13 reveals a painstaking congressional attempt to remove the federal courts as a potential ally of either side in a labor dispute. *See* Oberer and Hanslowe, *Labor Law* at 85 (1972). For example, Congress did not merely provide that employees may go on strike without fear of antitrust sanctions; rather, it provided that "any person" participating or interested in a "labor dispute" may "terminate a relation of employment." That language, appearing both in Clayton Act section 20 and Norris-LaGuardia Act section 4, is clearly broad enough to include a lockout by employers; it would be curious indeed if Congress chose such a phrase if it only meant to legitimize strikes. Similarly, Congress provided that persons interested in a labor dispute could pay to or withhold from parties "any moneys or things of value." This language applies to employers' mutual strike insurance as well as union strike benefits. *Kennedy v. Long Island Railroad*, 211 F. Supp. 478 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830, 84 S.Ct. 75 (1963); *Airline Pilots Association v. Civil Aeronautics Board*, 502 F.2d 453 (D.C. Cir. 1974), *cert. denied*,

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[24] Section 1 of the Clayton Act, 29 U.S.C. §53, defines "person" as including corporations.

420 U.S. 972, 95 S.Ct. 1939 (1975). The carefully balanced language of Clayton Act section 20 and Norris-LaGuardia Act sections 4 and 13 belies any Congressional intention to favor one side or the other in the use of the classic economic weapons of industrial relations.

F. The Legislative History of the Clayton and Norris-LaGuardia Acts Indicates That Employers Are Covered by the Statutory Exemption

The legislative history of the Clayton and Norris-LaGuardia Acts, not discussed in the majority's opinion, compels the conclusion that the majority has taken the "pro-labor" purpose of Clayton and Norris-LaGuardia too far. This is demonstrated, for example, by the colloquy between Senators Thomas and Smith during the Senate debate on the Clayton Act. In response to the charge that the Clayton Act was "class legislation" designed to protect employees and not employers, Senator Thomas, a supporter of the Act, denied the assertion as "a wholly untenable position." In this regard, he relied on the broad definition of "person or persons" and the evenhanded treatment given by the bill to each side in a labor dispute. He stated:

> "Hence the words 'person or persons' [in section 20 of the Clayton Act] mean corporations or associations as well as individuals, *and the paragraph gives to these artificial persons the same rights, the same exemptions, the same authority*, that are conferred upon individuals . . . . The corporation therefore has the same authority as the individual under this clause to terminate relations of employment . . . . *The corporation has the same authority as the individual to cease to perform work or labor and to recommend, advise, or persuade others by peaceable means to do so* . . . . The corporation has the same authority as the individual to exercise that authority without any danger of the restraining process of injunction . . . ."

51 Cong. Rec. 14333 (August 27, 1914) (emphasis added).

Senator Smith then suggested that the proposal would allow employers to break employment contracts, because Clayton Act section 20 provided that none of the acts specified therein shall be "considered or held unlawful." In the debate the following day, Senator Smith stated:

> "Under no circumstances could I consent to vote for a bill that undertook to say that the breaking of a contract of employment by an employer should not be considered or held unlawful. . . ."

Id. at 14366 (August 28, 1914).

These concerns were resolved by adding a provision that the specified acts would not be considered a violation "of any law of the United States." In this manner, breaches of employment contracts could still be remedied under state law. However, the colloquy demonstrated that both senators believed that employers were protected by section 20.[25]

It seems clear that Congress knowingly and intentionally adopted language which encompassed employers. The Clayton Act was intended to give equal treatment to employers and unions. As stated by Representative Buchanan, "the purpose of . . . [section 20] is to prevent class legislation or application by the courts of this legislation to a class." 51 Cong. Rec. 16338 (October 8, 1914).

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[25] A few days later, Senator Thomas proposed an amendment which would substitute the words "individual or individuals" in section 20 for the phrase "person or persons." 51 Cong. Rec. 14597 (September 2, 1914). The purpose of the amendment was to eliminate the language which would "exempt corporations from the consequences of acts . . . done by themselves or in combination with individuals or associations of individuals . . . ." *Id.* Although this amendment was passed, the original language, "person and persons," was restored in Conference. Report of the Conference Committee, H.R. Rep. No. 1168, 63d Cong., 2d Sess. 16 (1914). Representative Webb, floor manager of the bill, explained this action to the House as follows:

> "We struck out 'individual' which the Senate inserted, and restored the word 'person,' which includes persons, individuals, corporations, and everybody else that can act."

51 Cong. Rec. 16279 (October 7, 1914).

The Norris-LaGuardia Act, as noted in *United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463 (1941), sought to restore the Clayton Act following restrictive judicial interpretations. In so doing, Congress did not intend a double standard for employers and employees, but rather preserved the equal treatment found in the Clayton Act. Thus, Senator Norris stated in the Senate debates:

> "Wherever it can be done this bill applies equally to organizations of labor and to organizations of capital. Organizations of employees and organizations of capital are treated exactly the same."

Senate Debates, 72d Cong., 1st Sess. (1932), *reprinted in Statutory History of the United States, Labor Organization* 223 (R. Koretz & B. Schwartz ed. 1970). Senator Wagner likewise noted: "[The bill] asks for the laboring man nothing that it does not concede to the corporation." *Id.* at 228.

In light of the clear rejection by Congress of the idea that the Clayton and Norris-LaGuardia Acts were "class legislation" statutes, the majority cannot be correct when it uses the "pro-labor" purpose of the legislation to undermine the very evenhandedness that Congress sought to achieve.

G. Plaintiffs Lack Standing to Assert Any Injury Cognizable Under the Antitrust Laws

Section 4 of the Clayton Act, 15 U.S.C. §15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ."

The literal language of this statutory provision would seemingly provide a treble damage recovery to anyone who could prove any injury to his business or property causally related to the occurrence of an antitrust violation.[26] Such a broad interpretation, however, was quickly rejected by the federal courts.[27]

This Court has recognized the "endlessness and futility of the effort to follow every transaction to its ultimate result."[28]

This Court has not previously determined the extent to which section 4 limits the class of persons who may seek treble damages for antitrust violations.[29] This Court, however, has recognized the overwhelming weight of authority supporting the proposition that some reasonable limitation on the class of persons entitled to sue is required.

> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."

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[26] *In re Multidistrict Vehicle Air Pollution, M.D.L. No. 31*, 481 F.2d 122, 125 (9th Cir.), *cert. denied*, 414 U.S. 1045, 94 S.Ct. 551 (1973).

[27] *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910) (limiting standing under section 7 of the Sherman Act, the predecessor to section 4 of the Clayton Act).

[28] *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534, 38 S.Ct. 186, 186 (1918) (Holmes, J.).

[29] The issue of whether a particular party has standing under the Constitution to invoke the federal judicial power is analytically distinct from the issue of whether a party has standing under a particular statute conferring rights and remedies on a particular class of persons. The former issue involves Article III's limitation that the federal judicial power shall extend only to "cases" or "controversies." It also involves an aspect of the federal judiciary's self-imposed prudential limitation on the exercise of its constitutional power. The latter issue involves questions of statutory interpretation. When a Congressional enactment is relied on by the plaintiff as creating the right and remedy, as it is here, "the standing question . . . is whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2206 (1975) (footnote omitted).

Hawaii v. Standard Oil Co., 405 U.S. 251, 262 n.14, 92 S.Ct. 885, 891 n.14 (1972) (citations omitted).[30]

This Court has also held that there are non-standing limitations on the parties which may recover damages sustained as a result of antitrust violations. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061 (1977), the Court held that an indirect purchaser of commercial products may not sue the alleged antitrust violator for damages under the federal antitrust laws on the theory that illegal overcharges for the products were "passed-on" to the indirect purchaser.[31] A primary reason for the Court's holding was its concern with problems of proof and its wish not to further complicate treble damage actions.[32] While *Illinois Brick* did not deal with standing,[33] the Court's concern that antitrust plaintiffs not be too far removed from the initial impact of the injury is clearly relevant to the present issue.

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[30] One court of appeals suggests that this Court's opinion in *Perkins v. Standard Oil Co.*, 395 U.S. 642, 89 S.Ct. 1871 (1969), goes beyond merely noting the weight of lower court authority imposing limitations on persons entitled to sue under section 4. In *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1175 (5th Cir. 1976), the court stated:

> "[T]he Supreme Court in *Perkins* apparently approved the principle that not all injuries caused by antitrust violations are entitled to remedy by treble damage actions."

[31] The Court adhered to its previous decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224 (1968):

> "[A] direct purchaser suing for treble damages under §4 of the Clayton Act is injured within the meaning of §4 by the full amount of the overcharge paid by it . . . ."

431 U.S. at 724, 97 S.Ct. at 2064.

[32] The Ninth Circuit failed to consider the serious evidentiary problems, addressed by this Court in *Illinois Brick*, which are presented when remote victims of an antitrust violation seek to recover monetary damages. The uncertainties and complexities which the Court wished to avoid in *Illinois Brick* would arise with renewed vigor if the present action is permitted to proceed.

[33] The Court stated:

> "[W]e do not address the standing issue, except to note . . . that the question of which persons have been *injured* by an illegal overcharge for purposes of §4 is analytically distinct from the question of which persons have sustained injuries too remote to give them *standing* to sue for damages under §4."

431 U.S. at 728 n.7, 97 S.Ct. 2065 n.7 (citations omitted; emphasis added).

The courts of appeals have developed three separate tests to determine whether a party has standing to bring an action for treble damages: the "direct injury" test, the "target area" test, and the "zone of interests" analysis. The "direct injury" test, which evolved early in this century,[34] has been largely discredited and will not be analyzed in detail here.[35] A clear majority of the circuit courts have adopted the "target area" test to determine a plaintiff's standing.[36] One court of appeals has suggested that this Court has implicitly adopted the "target area" test.[37] The "zone of interests" analysis is of recent vintage, and without wide support among the circuits.

The "target area" approach to standing focuses on the claimant's relationship to the area of the economy threatened by the alleged antitrust violation.

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[34] *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910), is generally cited as the seminal case adopting the "direct injury" test. In *Loeb*, the court held that a stockholder-creditor of an injured corporation lacked standing to recover treble damages against an alleged antitrust violator which was a competitor of the injured corporation.

[35] It is clear, however, that the plaintiff Unions in this action would lack standing to sue under the "direct injury" test. The "direct injury" analysis requires that the plaintiff demonstrate that his injury is the proximate, direct result of the prohibited activity. *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 394-95 (6th Cir. 1962), *cert. denied*, 372 U.S. 907, 83 S.Ct. 721 (1963). The test focuses on the relationship between the alleged antitrust violator and the claimant.

[36] *See In re Multidistrict Vehicle Air Pollution, M.D.L. No. 31*, 481 F.2d 122, 127 n.7, and cases cited therein.

[37] *In re Multidistrict Vehicle Air Pollution, M.D.L. No. 31*, 481 F.2d 122, 128, 129 (9th Cir. 1973). Relying on this Court's decision in *Perkins v. Standard Oil Co.*, 395 U.S. 62, 89 S.Ct. 1871 (1969), the Ninth Circuit stated:

> "By repudiating all those aspects of the 'direct injury' test that distinguish it from the 'target area' approach, and by embracing and applying the latter, the Court . . ., at least inferentially, impresses its imprimatur upon the 'target area' approach articulated by this court . . . ."

481 F.2d at 129 (citations omitted).

The "target area" test is explained by the court *In re Multidistrict Vehicle Air Pollution, M.D.L. No. 31*, 481 F.2d 122, 129 (9th Cir.), *cert. denied*, 414 U.S. 1045, 94 S.Ct. 551 (1973):

> "A proper application of 'by reason of' focuses on whether the anticompetitive conduct directed against an area of the economy injured business operations conducted by the claimant in that sector of the economy. The resulting two-step approach first requires identification of the affected area of the economy and then the ascertainment of whether the claimed injury occurred within that area."

A "measured approach" is required of any test for standing. *In re Multidistrict Vehicle Air Pollution, M.D.L. No. 31*, 481 F.2d at 125. The test must "confine the availability of section 4 relief only to those individuals whose protection is the *fundamental purpose* of the antitrust laws." *Id.* (emphasis added).

In the case at bar, it is clear that the Unions are not within the "target area" at which the alleged anticompetitive practices were aimed. The Complaint alleges that AGC and its members performed various acts to frustrate the Unions' efforts to see that construction work, including subcontracted work, was performed by unionized contractors. Clearly, the businesses directly endangered by such acts are the unionized contractors who stand to lose construction business if contracts are awarded to non-union contractors. The Unions are bystanders in this struggle between unionized and non-unionized construction businesses.

The situation would be different if the employers concocted a "sweetheart" agreement with a rival union or set up a "sham" union to draw union supporters away from the plaintiffs. In such a case, it is clear that the Unions might have a claim against the rival or "sham" union and its co-conspirators. *See Tugboat, Inc. v. Mobile Towing*

Co., 534 F.2d 1172 (5th Cir. 1976). But no such facts are alleged in this case.

The Ninth Circuit's opinion insists that the Unions are within the "target area" of the economy affected by AGC's alleged anticompetitive practices. 648 F.2d at 538. In fact, however, prior cases employing the target area analysis reach results contrary to the Ninth Circuit's conclusion in this case.

In *Contreras v. Grower Shipper Vegetable Association*, 484 F.2d 1346 (9th Cir. 1973), *cert. denied*, 415 U.S. 932, 94 S.Ct. 1445 (1974), agricultural field workers were denied standing to seek damages under the antitrust laws as a result of reduced availability of work, attributable to an alleged conspiracy among growers to limit the production of iceberg lettuce. Like the Unions in this case, the employees in *Contreras* were bystanders rather than targets of the alleged conspiracy. Similarly, in *Gutierrez v. E & J Gallo Winery Co., Inc.*, 604 F.2d 645 (9th Cir. 1978), farm workers were denied standing to recover damages for loss of wages attributable to reduced work opportunities resulting from antitrust violations which had injured the employees' employers.

In the present action, the Unions are further removed from the target area than the employees were in *Gutierrez* and *Contreras*. Three areas of competition intervene between the alleged antitrust violation and the plaintiff Unions. The area of the economy most directly affected by the alleged antitrust violation is contracting and subcontracting in the construction industry, which impacts upon unionized employers. A secondary consequence of the violation is that unionized employees may lose work opportunities. The local unions to which these employees belong, which derive dues revenue from these employees, are at best victims three times removed from the violation. Finally, the Carpenters 46 Northern Counties Conference Board, to which the local unions and district councils belong, loses revenues and representational opportunities only at a fourth level removed from the antitrust violation.

Moreover, it is worth noting that the second tier of "victims" of the alleged antitrust conspiracy may not be victims at all. Unionized workmen will not necessarily lose work opportunities if construction contracts are awarded to open shop contractors. It is an unfair labor practice to refuse to hire workmen because of their union affiliation. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187, 61 S.Ct. 845, 849 (1941).

If the Ninth Circuit's view of plaintiffs' standing in this case were sustained, it would be difficult to imagine a business entity which would lack standing to sue for violation of the antitrust laws, no matter how far removed from the source of the violation.

In *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975), the Sixth Circuit adopted the so-called "zone of interests" analysis as the test for standing under section 4 of the Clayton Act.[38] The court's adoption of the "zone of interests" test for antitrust standing may be traced, in part, to its erroneous assumptions regarding the connection between section 4's causation requirement and the aspect of standing involving judicial self-restraint.[39] The court also failed to give sufficient weight to the fundamentally different nature of a citizen's challenge to the exercise of governmental power under the Administrative Procedure Act[40] and an antitrust action between private litigants, where the defendant may be held liable for treble damages.[41]

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[38] The birthplace of the "zone of interests" test for antitrust standing is not in the field of antitrust law, but in the field of administrative law. In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827 (1970), this Court held that the test for standing under the Administrative Procedure Act to challenge agency action, apart from the case or controversy requirement, is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question." 397 U.S. at 153, 90 S.Ct. at 830.

The zone of interests analysis eviscerates the causation language of section 4, and allows any plaintiff who alleges "injury in fact" related to an antitrust violation to proceed with a claim for treble damages. Seldom, if ever, will a plaintiff not be able to show that the "interest" which he seeks to protect falls "arguably" within the "zone of interests" which the antitrust laws are designed to protect.

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[39] The court compared the language of section 4 to the two constitutional aspects of standing developed by this Court — the constitutional "case" or "controversy" requirement and the judiciary's self-imposed prudential limitations on the exercise of its power. The court correctly noted that section 4's requirement that the person bringing suit be "injured in his business or property" was sufficient to satisfy the Article III "case or controversy" requirement. 521 F.2d at 1149. The court, however, confuses the statute's causation language ("by reason of") with the second aspect of standing discussed in this Court's decisions — judicial self-restraint. Section 4's causation requirement is a limitation imposed by Congress, which is vested with the power to allocate federal court jurisdiction. *Palmore v. United States*, 411 U.S. 389, 401, 93 S.Ct. 1670, 1678 (1973). The determination of which parties have standing under statutory provisions crafted by Congress is analytically distinct from self-imposed limitations on the exercise of federal judicial power, the second aspect of this Court's standing analysis.

[40] A liberal test for standing, which presses the outer limits of the Article III "case" or "controversy" requirement, is justified when a citizen challenges as arbitrary an exercise of governmental power. *See generally* R. Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U.L. Rev. 374 (1976).

[41] The Administrative Procedure Act confers standing on any person "aggrieved by agency action." It is instructive to note that, in another context, this court has held that a statute granting standing to any "person aggrieved" is coextensive with the limits of Article III judicial power. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 93 S.Ct. 364, 366-67 (1972). *See also Hackett v. McGuire Brothers, Inc.*, 445 F.2d 442 (3d Cir. 1971). Section 4 of the Clayton Act, of course, uses completely different terminology, and speaks of "injury . . . by reason of" an antitrust violation.

The plaintiff's interest will always translate into an economic loss. So long as a plaintiff is able to allege some injury to his economic interests causally related to an antitrust violation — *e.g.*, the plaintiff sold less, or was charged too much, or was unable to expand, or was driven out of business — it is difficult to imagine how such interest would not "arguably" fall within the zone of interests to be protected by the antitrust laws.

Accordingly, this Court should reject the "zone of interests" test for antitrust standing in favor of a more meaningful test.[42]

VII
CONCLUSION

For the reasons set forth herein, the decision of the Ninth Circuit Court of Appeals should be reversed.

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[42] The Third Circuit has also embraced a variation of the "zone of interests" test. *See Bravman v. Bassett Furniture Industries, Inc.*, 552 F.2d 90 (3d Cir.), *cert. denied*, 434 U.S. 823, 98 S.Ct. 69 (1977); *Cromar v. Nuclear Materials & Equipment Corp.*, 543 F.2d 501 (3d Cir. 1976). The Third Circuit's adoption of the test, however, may be attributed to its desire to discredit the overly restrictive "competitors only" standing analysis which appeared to find some support in the circuit court's decisions, and was earnestly advanced by defense advocates before the court. *See Cromar v. Nuclear Materials & Equipment Corp.*, 543 F.2d at 504-05.

Respondent's Brief

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No. 81-334

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,
Petitioner,

VS.

CALIFORNIA STATE COUNCIL OF CARPENTERS AND
CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES
CONFERENCE BOARD,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Did the allegations contained in the unions' complaint state a violation of the Sherman Act?

2. Does the statutory labor exemption apply to the alleged conduct?

3. Does the nonstatutory labor exemption apply to the alleged conduct?

4. Did the unions have standing to bring this action?

PARTIES TO THIS ACTION

The parties to this action are:

1. The Associated General Contractors of California, Inc., a non-profit trade association;

2. The California State Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, an unincorporated labor organization; and

3. The Carpenters 46 Northern California Counties Conference Board, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, an unincorporated labor organization.

The State Council of Carpenters and the Carpenters 46 Northern California Counties Conference Board represent approximately 14 district councils and approximately 125 local unions.

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No. 81-334

In the Supreme Court

OF THE

United States

October Term, 1981

Associated General Contractors of California, Inc.,
Petitioner,
vs.
California State Council of Carpenters and
Carpenters 46 Northern California Counties
Conference Board,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF OF RESPONDENTS

I

STATEMENT OF THE CASE

The complaint was filed in 1975 by the California State Council of Carpenters and the Carpenters 46 Northern California Counties Conference Board (hereinafter referred to collectively as the "Plaintiffs" or "Respondents"). (R. 1) The named defendant was the Associated General Contractors of California, Inc. (hereinafter "Defendant" or "Petitioner"). Plaintiffs are affiliated with the United Brotherhood of Carpenters and Joiners of America, an international union affiliated with the AFL-CIO. Defendant is a trade association of construction industry employers including the largest and most influential general contractors in the construction industry in California, as contained in the list of names attached to the complaint. (R. 1-19)

Since this matter is before the Court on the pleadings, the factual allegations are not in dispute. The basic allegations are contained in paragraph XXIV of the complaint which alleges that, *inter alia*, the Defendant had conspired to, and had:

(3) Advocated, encouraged, induced, and aided non-members of defendant Associate General Contractors of California, Inc., to refuse to enter into collective bargaining relationships with plaintiffs and each of them; (R. 369)

(4) Advocated, encouraged, induced, coerced, aided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs and each of them; (R. 369)

(5) Advocated, induced, coerced, encouraged, and aided members of Associated General Contractors of California, Inc., non-members of Associated General Contractors of California, Inc., and "memorandum contractors" to enter into subcontracting agreements with subcontractors who are not signatories to any collective bargaining agreements with plaintiffs and each of them. (R. 369)

These allegations were made in the context that Plaintiffs and Defendant maintained long-standing and historic "master" bargaining agreements through multi-employer-multi-union bargaining groups. (648 F.2d at 529)

The Ninth Circuit found that the complaint, when properly construed, did state a cause of action under the Sherman Act. (648 F.2d at 532) Specifically, the Ninth Circuit characterized the Sherman Act claim in this case as the flip side or obverse of this Court's decision in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). It stated that the complaint alleged a conspiracy to "boycott union-signatory contractors" based on the fact that Defendant conspired to agree with and/or coerce owners of land and other "letters of contracts" to hire and/or do business only with contractors who did not have a signatory or collective bargaining relationship with Plaintiffs, and concluded with the phrase that the allegations of the complaint "present virtually the obverse of the situation described in *Connell.*" (*Id.* at 530-32)

II
SUMMARY OF THE ARGUMENT

The court below specifically supported this Court's rationale in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). Therefore, it will not be the position of the Respondents to attempt to undermine *Connell.*

Prior to *Connell*, it was thought that antitrust laws would be inapplicable to traditional labor-management conduct cognizable under the Labor Management Relations Act, as amended (29 U.S.C. §§ 141-197) (hereinafter "LMRA"), and subject to Congress' statutory proscription. Thus, *Connell* conduct was subject to regulation by the LMRA and subjected the violator to a damage action under Section 303 of the LMRA. It was generally accepted that a union would not be subject to treble damages under the antitrust laws at the same time as it was subject to both statutory regulation as well as damage liability under Sections 8(b)(4) and 303 respectively (29 U.S.C. §§ 158(b)(4) and 187). However, this Court's decision in *Connell* changed those notions and made it clear that a union was subject to regulation and exposure under both the labor and antitrust laws. Indeed, a union can now be faced with having the decision of the National Labor Relations Board used against it by way of collateral estoppel with respect to liability in an antitrust action.

Since our role is not to reargue *Connell* or to discuss its correctness, but rather to support it, Respondents respectfully urge that *Connell* rules must be equally applicable to an allegation by a union that an employer, an owner, and a contractor conspired to restrain entry into the marketplace based upon a union-signatory employer system, which is the obverse triangle of a union conspiracy with an employer to restrain competition based upon a non-signatory employer system.

The Ninth Circuit's holding does not "fly in the face" of the decision of this Court in *Connell* but, in fact, supports and reinforces that decision. It would be strange if the balance of strength between labor and management were weighted with an unequal distribution of consequences. *Connell* lies at the heart of the Ninth Circuit's decision, and if that decision is not upheld by this Court, unions will be victims without an antitrust remedy for employer conduct which is exactly the same as the conduct for which they can be sued.

The statutory exemption which normally is a shield for labor organization activities cannot be claimed by the Petitioner in this case merely because a labor organization is the plaintiff; the labor exemption shield was designed to protect labor organizations and their collective bargaining partners under very narrow and restricted circumstances, not to protect entrepreneurs who had targeted a labor organization for extinction. Thus, the statutory exemption is not available to the Petitioner. Similarly, the nonstatutory exemption is not available to the Petitioner because the alleged conspiracy arose outside a collective bargaining context.

Finally Respondents will argue that they have standing pursuant to the provisions of the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, and the Clayton Act, 15 U.S.C. §§ 12 *et seq.*, to pursue Sherman Act claims because (1) of this Court's interpretation of the statutory language, (2) Respondents are covered by the "target area" test adopted by the Ninth Circuit, which test has never been rejected by this Court, and (3) Respondents have alleged a cause of action which would entitle them to *either* injunctive relief or damages, contrary to the position taken by the Solicitor General.

III

ARGUMENT

A. The Complaint States a Sherman Act Cause of Action

The Sherman Act provides in part that "[e]very . . . conspiracy, in restraint of trade or commerce . . . is . . . illegal." (15 U.S.C. § 1) The Sherman Act has often been discussed in the labor-management context and the present controversy is not new. Thus it has been held that the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . [It protects] all who are made victims of the forbidden practices by whomever they may be perpetrated." (*Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). *See also Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941) (coercive group boycott restricting commercial competition held illegal regardless of its reasonableness)) However, the Sherman Act does not reach every conspiracy restraining trade but is limited to those that affect commercial competition. (*Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940))

In order to proscribe the use of the Sherman Act against unions and the collective bargaining process, Congress enacted the Clayton Act in 1914. (*Loewe v. Lawlor (Dan-*

bury Hatters), 208 U.S. 274 (1908) (secondary boycott of a manufacturer found to violate the Sherman Act). *See* D. Leslie, *Cases and Materials on Labor Law* 430 (1979) ("The Sherman Act was passed . . . to curtail business monopolies . . . [but it was initially] applied . . . more often to union than to employer business activity.")) After the enactment of the Clayton Act, courts continued to proscribe certain union activities on the theory that they violated antitrust notions and, therefore, Congress passed the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115,[1] which prohibited the issuance of injunctions and addressed itself to this subject in order to put an end to the courts' continual use of the Sherman Act against unions. (*Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (no antitrust immunity for union which departed from "legitimate" objectives). *See also Coronado Coal Co. v. UMW*, 268 U.S. 295 (1925))

This Court has been struggling with the problem of how to resolve the conflict between laws which are designed to promote competition and laws which regulate labor-management relations and which, in part, protect efforts to eliminate competition involving wages, hours and working conditions. (*Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940)) In *Apex Hosiery* this Court held the Sherman Act inapplicable to a strike. Although strikes restrain trade, their purpose is not the reduction of commercial competition in the product market. The question of whether the Clayton or Norris-LaGuardia Acts statutorily exempted the union's conduct was not reached. (*See also Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945); Comment, *Antitrust Law in the Labor-Management Context: The*

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[1] Section 13(c) of the Norris-LaGuardia Act defines a labor dispute as "any controversy . . . concerning the association or representation of persons in negotiating . . . conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*" (Emphasis added) (29 U.S.C. § 113(c))

Employer as Defendant and the Union as Plaintiff, 32 Baylor L.Rev. 385 (1980))

Petitioner attempts to characterize the instant dispute as a labor grievance. However, Petitioner's characterization is inaccurate. Here the Petitioner entered into an agreement and conspiracy to boycott union-signatory subcontractors. It is obvious that the Petitioner's conduct falls within the category of a classic group boycott regulated by the antitrust laws. In addition, Petitioner's conduct herein is simply the obverse of the unlawful conduct in *Connell*. In *Connell*, non-union subcontractors were indiscriminately excluded from the subcontracting market; here union-signatory subcontractors are similarly excluded. Since the restraint on commercial competition is the same, the antitrust implications in both cases must also be the same.

B. Labor's Statutory Exemption Is Inapplicable

It would seem somewhat presumptuous to engage in a lengthy discussion of the statutory exemption in this case in view of the fact that the Petitioner, a trade association, seeks the protection of and to hide behind the curtain of the statutory exemption. Clearly, that exemption was designed to protect unions and not employer conduct and should not be available to Petitioner in this case. However, since the Petitioner does try to hide behind the statutory exemption, the history and scope of that exemption must be examined.

The statutory exemption for union activity was propounded in *United States v. Hutcheson*, 312 U.S. 219 (1941). The Court held that the Norris-LaGuardia Act and Section 20 of the Clayton Act, read together with the Sherman Act, determine what type of union conduct is exempt and as long as "a union acts in its self-interest and does not combine with non-labor groups" its activities are exempt from antitrust scrutiny. (312 U.S. at 232)

In *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945), the Court denied the statutory exemption to a union which combined with employers in fixing markets and prices. The Court found that a union loses its statutory exemption if it combines with business in carrying out activities which, if conducted by business alone, would violate the antitrust laws. "We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act." (325 U.S. at 811) (*See generally,* L. Sullivan, *Handbook of the Law of Antitrust* 724 (1977))

It is clear that taken together the decisions of this Court in *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940), *United States v. Hutcheson,* 312 U.S. 219 (1941), and *Allen Bradley Co. v. Local 3, IBEW,* 325 U.S. 797 (1945), set the scope of labor's antitrust exemption.

In *Apex Hosiery,* traditional union conduct was examined and found not to be the type of commercial restraint meant to be covered by the Sherman Act. For example, restraints on the sale of the employee's services to the employer, regardless of the extent to which competition among employees was curtailed, were not considered restraints of trade under the Sherman Act. (*Id.* at 503) Similarly, the elimination of price competition based on differences in labor standards, which is the objective of any national labor organization, was not considered to be the kind of curtailment of price competition prohibited by the Sherman Act. (*Id.* at 503-04)

In *United States v. Hutcheson,* 312 U.S. 219 (1941), decided one year after *Apex Hosiery,* this Court laid the groundwork for what has come to be known as labor's "statutory" exemption from the antitrust laws.[3] That decision first reviewed the legislative history of the Clayton

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[3] *Hutcheson* involved a jurisdictional dispute, the type of conduct which subsequently became prohibited by Section 8(b)(4)(D) of the LMRA (29 U.S.C. § 158(b)(4)(D)), and subject to a damage action under Section 303 of the same Act (29 U.S.C. § 187), as was the *Connell* conduct.

Act and, in particular, Section 20 of that Act; the restriction by the courts of the scope of Section 20 to union activities directed against an employer by its own employees (as, for example, the United States Supreme Court's decision in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921)); and, the response by Congress to these court decisions through the enactment of the Norris-LaGuardia Act. The Court concluded that:

> "whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." (312 U.S. at 231)

Section 20 of the Clayton Act provides that union conduct specified thereunder shall not "be considered or held to be violations of any law of the United States." (29 U.S.C. § 52) Thus, the central lesson of *Hutcheson* is that any union conduct which is immune from injunction based on the Clayton or Norris-LaGuardia Acts is also immune from criminal prosecution and treble damages under the Sherman Act. In this regard, the decision reasoned:

> "To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the Duplex Printing Press Co. Case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines. That is not the way to read the will of Congress, particularly when expressed by a statute which, as

> we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness." (312 U.S. at 234-35)

The Court's reasoning applied to any form of secondary pressure encompassed by Section 20 of the Clayton Act as expanded by the Norris-LaGuardia Act's definition of a "labor dispute." For example, the traditional secondary boycott of *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), and the refusal to work on non-union goods in *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association*, 274 U.S. 37 (1927), both of which involved neutrals and therefore did not constitute a labor dispute under the Clayton Act, were no longer subject to antitrust damages and criminal liability as a result of *Hutcheson*. The effect of *Hutcheson* was to overrule *Duplex Printing Press* and *Bedford Cut Stone*. As the *Hutcheson* decision and subsequent decisions of this Court made clear, much of the secondary pressure condemned by the antitrust laws prior to *Hutcheson* was no longer illegal under any body of law until at least the LMRA of 1947. (*United States v. American Federation of Musicians*, 318 U.S. 741 (1943), *aff'g per curiam* 47 F.Supp. 304 (N.D.Ill. 1942); *United States v. Building and Construction Trades Council*, 313 U.S. 539 (1941); *United States v. United Brotherhood of Carpenters*, 313 U.S. 539 (1941); *United States v. International Hod Carriers District Council*, 313 U.S. 539 (1941))

This Court closed the circle with respect to the definition of the so-called statutory exemption in *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945). In that case, the Court scrutinized an alleged conspiracy between a union, contractors and manufacturers of goods to fix prices and to monopolize the marketing of such goods, in part, by means of closed shop and hot cargo agreements. According to the Court, a union loses its antitrust immunity once it collaborates with non-labor groups to create business monopolies and to control the marketing of goods and services. It makes no difference that the union conspires in order to further its own legitimate interests or that its actions in furtherance of the conspiracy would otherwise have come within the statutory exemption. Thus, "the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." (325 U.S. at 810) The Court assumed that, in the absence of a conspiracy, a collective bargaining agreement, which imposed closed shop and hot cargo restraints, "standing alone would not have violated the Sherman Act" (*id.* at 809) (and, at that time, would have been lawful under the Wagner Act, 49 Stat. 449 (1935)).

It has been noted that this "trilogy of hallmark opinions"—*Apex, Hutcheson* and *Allen Bradley*—teaches that whether or not the labor exemption encompasses specific conduct turns on the answers to three questions:

> "First, is the challenged conduct exempt under Norris-LaGuardia from the issuance of a labor injunction? Second, does the conduct substantially affect market competition? Third, is it unilaterally motivated? Thus, if union conduct is embraced by the permissive provisions of Norris-LaGuardia, or if it does not have the effect of restraining commercial competition (as opposed to competition based on differences in labor standards), and if it is pursued by the union solely in its own self-interest, it is exempt from antitrust liability. Conversely, if the challenged conduct is outside the protective ambit of Norris-LaGuardia, and if it directly affects market competition, or if it is the product of conspiracy with employer groups, then it is subject to the antitrust laws." (Handler & Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption,* 81 Colum. L. Rev. 459, 482-83 (1981))

In 1965, this Court decided *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), both of which figured heavily in its opinion in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). The issue in both *Pennington* and *Jewel Tea* was whether a collective bargaining agreement on a mandatory subject of bargaining under the LMRA was exempt from the antitrust laws.

In *Pennington*, the Court held that a union forfeits its exemption from the antitrust laws when it agrees with one set of employers to impose a certain wage scale on other employers in the industry. In *Jewel Tea*, the Court held that a multi-employer collective bargaining agreement which contained a clause restricting the employers' marketing hours was exempt from the antitrust laws. It would seem totally inappropriate, when reviewing the rationale of this Court in these cases, for Petitioner to claim an exemption designed to protect labor organizations and never envisioned as protection for individual entrepreneurs, employers and trade associations.

In *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), this Court cited *Hutcheson* for the proposition that Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act, the basic sources of organized labor's exemption from federal antitrust laws, "exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws." (421 U.S. at 622) Without further elaboration, the decision concluded, citing *Pennington*, that these statutes "do not exempt concerted action or agreements between unions and non-labor parties." (*Id.*)[a]

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[a] In *Pennington*, it was noted that neither Section 20 of the Clayton Act nor Section 4 of the Norris-LaGuardia Act "expressly deals with arrangements or agreements between unions and employers. Neither section tells us whether any or all such arrangements or agreements are barred or permitted by the antitrust laws." (*Pen-*

One commentary, in discussing the issue of whether or not the statutory exemption propounded in *Hutcheson* was applicable to agreements between unions and employers, noted:

> "*Hutcheson* was not written in a vacuum. It was rendered against a backdrop of national policy, as expressed in the preambles to both the Norris-LaGuardia and Wagner Acts, that promotes collective bargaining, the paramount goal of union coercion and the preferred method for resolving 'labor disputes,' and which established the NLRB as the expert arbiter of union and management conduct. (Footnote omitted) (Handler & Zifchak, *supra* p. 10, at 479)

Similarly, it has been pointed out that "it would make no sense to immunize the coercion while condemning the peace treaty that ends it. There is no reason to infer that a Congress which did not expressly require it impliedly meant to effect so foolish a result." 1 P. Areeda & D. Turner, *Antitrust Law* 193 (1978). This interpretation of *Hutcheson*

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nington, 381 U.S. at 662) In support of this assertion, the following passage from *Hutcheson* was quoted and the emphasis was added as indicated:

> "So long as a union acts in its self-interest *and does not combine with non-labor groups*, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." (*Id.*, quoting *Hutcheson*, 312 U.S. at 232)

Significantly, neither *Pennington* nor *Connell* mentioned the fact that Justice Frankfurter clarified this statement ("and does not combine with non-labor groups") by referring in a footnote to *United States v. Brims*, 272 U.S. 549 (1926), which involved an employer conspiracy to allocate markets, a situation quite similar to that later condemned in *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945). As Justice Goldberg, joined by Justice Harlan and Justice Stewart, noted in his separate opinion in *Pennington* and *Jewel Tea*, the situations presented in *Brims* and *Allen Bradley* were "far different" from the situations in *Pennington* and *Jewel Tea*. (381 U.S. at 706 n. 6) was not contradicted by subsequent decisions of this Court until *Pennington, Jewel Tea* and *Connell.* (Handler & Zifchak, *supra* p. 10, at 478 n. 119, citing *American Federation of Musicians v. Carroll,* 391 U.S. 99, 106 (1968); *Local 24, Teamsters v. Oliver,* 358 U.S. 283 (1959) (state antitrust law claim); *Allen Bradley Co. v. Local 3, IBEW,* 325 U.S. 797 (1945); and *United States v. American Federation of Musicians,* 318 U.S. 741 (1943), *aff'g per curiam* 47 F. Supp. 304 (N.D. Ill. 1942))

Petitioner and perhaps the Solicitor General urge, implicitly, that unions should continue to be saddled with the liability of the Sherman Act when seeking restrictive subcontractor clauses in the context of *Connell,* but that combinations of employers seeking the opposite restrictive subcontractor clauses should be free from Sherman Act implications. That cannot be the logical result. If, in fact, it is the subcontracting agreement of *Connell* which is no longer protected from antitrust liability by the statutory exemption, then clearly the Petitioner here cannot now claim this exemption as a shield or protection for its conduct when it in fact seeks and coerces a subcontracting agreement which excludes union-signatory subcontractors. In other words, if the defendant in *Connell* is determined to have violated the Sherman Act by seeking to restrict the selection of subcontractors *to* those who *are* signatory to union agreements, then obviously conduct which seeks to restrict the selection of subcontractors *to* those who are *not* signatory would be equally prohibited. It would appear that *Connell* modified *Hutcheson* by declaring that what had previously been thought of as activities governed solely by the LMRA (i.e., restrictive subcontractor clauses) were now subject to Sherman Act liability.

Therefore, the Ninth Circuit was correct in its determination that the Petitioner could not benefit from the statutory exemption for the following two reasons:

> "(1) the exemption has not been extended to anti-competitive conduct involving groups of businessmen,

and (2) such an extension, exempting antiunion conduct on the part of business groups, would be totally inconsistent with the pro-labor purpose for which section 20 [of the Clayton Act] was enacted." (*California State Council of Carpenters*, 648 F.2d at 533)

The Petitioner attempts to distinguish *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945), by claiming that *Allen Bradley* did not involve "unilateral concerted activity by employers in a *collective bargaining* context" and by characterizing the instant case as involving "employers' groups acting unilaterally in formulating and carrying out labor relations policies, and encouraging others to follow the same policies." (Emphasis supplied) (Brief of Petitioner at 34) While *Allen Bradley* did not involve "unilateral activity by employers in a collective bargaining context," neither does the instant case. The alleged conspiracy of Petitioner arose outside the collective bargaining process. While the conspiracy did arise in a labor-management context, *Allen Bradley* makes clear that that context does not immunize from antitrust liability the conspiracies which develop within it. To hold otherwise would mean that employers could restrain commercial competition with impunity as long as their ultimate aim was to weaken the union. Thus, even if the Petitioner was "carrying out labor relations policies," the alleged conspiracy was made outside the collective bargaining context and affected commercial competition among third parties, namely subcontractors.

The Petitioner contends that other circuit courts and district courts have found that Section 20 of the Clayton Act "does immunize concerted employer activity within the labor context." (Brief of Petitioner at 32) In support of this proposition, Petitioner cites *Amalgamated Meat Cutters Local 576 v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979) (a wholesale food supplier loaned employees to a retail food supplier in order to replace temporarily the striking meatcutters of the retailer); *Kennedy v. Long Island Railroad*, 319 F.2d 366, 372 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963) (multi-employer strike insurance plan did not violate the Sherman Act); *Clune v. Publishers' Association*, 214 F.Supp. 520, 528 (S.D.N.Y.), *aff'd mem.*, 314 F.2d 343 (2d Cir. 1963) (agreement by newspaper publishers in an industry-wide association to cease publication during the period of time that any of their number was prevented by a strike from publishing its own newspaper). An examination of these cases reveals that they do not stand for such broadly sweeping antitrust immunity. Rather these cases present instances of employers combining as part of the collective bargaining process in order to counter a union's "whipsaw" strike or other pressure tactic.

These three cases do not help the Petitioner in its attempt to extend the scope of the statutory exemption to cover its alleged conduct. All of the cases centered on employer responses to economic strikes by unions. Thus, in all three cases, the employer conduct clearly arose within the collective bargaining process. In addition, in *Kennedy*, the Second Circuit never even reached the issue of any possible statutory exemption since it held that the employer conduct in dispute did not violate the Sherman Act. In *Wetterau Foods*, the Eighth Circuit dismissed the statutory exemption as inapposite and relied instead on the nonstatutory exemption. In *Clune*, the court offered several reasons for the denial of a preliminary injunction, the first being that the plaintiffs had "not shown a likelihood of success in challenging the agreement as a violation of the anti-trust laws." (214 F.Supp. at 531) The court noted that the agreement did not have "the attributes of monopoly" and that there was "at least some doubt as to whether the agreement complained of is in restraint of trade or commerce among the several states." (*Id.* at 524-25)

Accordingly, the Ninth Circuit's first reason for its determination that the Petitioner herein could not benefit from the statutory exemption—"the exemption has not been extended to anticompetitive conduct involving groups of businessmen"—is sound.

The Ninth Circuit's second reason for its determination that the Petitioner could not benefit from the statutory exemption—"such an extention, exempting antiunion conduct on the part of business groups, would be totally inconsistent with the pro-labor purpose for which section 20 [of the Clayton Act] was enacted"—is similarly sound. The legislative history and specific statutory sections of the Clayton and Norris-LaGuardia Acts[4] make clear that "the limitations on the federal injunctive power embodied in these Acts were designed primarily to promote the organization of labor unions" which employers had frequently frustrated, prior to the passage of these Acts, through the use of injunctions. (*California State Council of Carpenters*, 648 F.2d at 535) It would be a bitter irony if the statutory exemption, embodied in the Clayton and Norris-LaGuardia Acts, were now construed to exempt "a conspiracy of employers to destroy a particular union through a boycott of union-signatory subcontractors." (*Id.* at 536) In addition, just last term, this Court stated: "Of course, a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur." (*H.A. Artists & Associates, Inc. v. Actors' Equity Association*, 101 S.Ct. 2102, 2110 n. 20 (1981))

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[4] *See* Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and Section 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102; *United States v. Hutcheson*, 312 U.S. 219, 229-31, 235-36 (1941); *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 802-05 (1945); *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 700-04 (1965) (Goldberg, J., concurring); *H. A. Artists & Associates, Inc. v. Actors' Equity Association*, 101 S.Ct. 2102, 2108-10 & n.20 (1981); Handler & Zifchak, *supra* p. 10, at 469-71.

C. Labor's Nonstatutory Exemption Is Inapplicable

In *Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975), the Court, citing *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1965), explained that the Court had recognized "a limited nonstatutory exemption from antitrust sanctions" for "some union-employer agreements." (*Connell,* 421 U.S. at 622) This exemption "has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions" and makes "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." (*Id.*) Justice Powell pointed out that the agreement in *Connell* "indiscriminately excluded nonunion subcontractors from a portion of the market" and gave the union "complete control over subcontract work offered by general contractors." (*Id.* at 623-24) It was concluded that the agreement was a "direct restraint on the business market" which had "substantial anticompetitive effects." (*Id.* at 625) Since the agreement contravened antitrust policies "to a degree not justified by congressional labor policy," it could not claim a nonstatutory exemption from the antitrust laws. (*Id.*) That decision further noted that the agreement was not favored by federal labor policy since it did not result from collective bargaining:

> "There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement. [Citations to *Pennington* and *Jewel Tea*] In this case, Local 100 had no interest in representing Connell's employees. The federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market." (*Id.* at 625-26)

Clearly, the Ninth Circuit is correct in its application of *Connell* that "the nonstatutory exemption may be invoked only in cases involving agreements between unions and employers on wages or working conditions." (*California State Council of Carpenters*, 648 F.2d at 536)

Indeed, this Court was obviously disturbed about the "indiscriminate" exclusion of non-union subcontractors from the marketplace or a portion of the marketplace in *Connell*. The effect of the Petitioner's conduct in this case is equally indiscriminate and would exclude *union* subcontractors from all or a portion of the marketplace. In fact, since the general contractors have almost a complete exclusive right to determine who will be the subcontractors on the job site, their power to indiscriminately exclude from the marketplace in the instant case would be far greater than the exclusionary power of the Plumbers Union in *Connell*. In that case, the plumbing subcontractors dealt with a specific sub-craft, whereas in this case, the general contractor's exclusionary power is limitless since the general contractor has the right to select all types of subcontractors without bid, there being no legal requirement that the bidding process be used.[5]

Since the Petitioner's alleged conduct in this case did not involve an agreement with a union and did not limit itself to the area of wages and working conditions, the nonstatutory exemption could not apply.

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[5] It is critical to note in the instant case that in California, general contractors are permitted to and historically did hire all types of craftsmen on their per diem payroll. (Cal. Bus. & Prof. Code § 7057 (Deering 1976)) The system of subcontracting for specialty craftsmen has been undergoing constant change as technology and the divisions of work at the job site have changed almost day-to-day. Congress recognized that the construction industry was a unique industry, and the relationship of the subcontractor to the general contractor was different from the so-called "neutral" in other work place situations. That is the reason that Section 8(e), 29 U.S.C. § 158(e), was enacted.

D. Respondent Unions Have Standing to Bring this Action

The statutory basis for private antitrust damage actions is Section 4 of the Clayton Act, 15 U.S.C. § 15, which confers the right to sue for treble damages on "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ." On its face, this section seems to grant a right of action to anyone who can prove "factual causation," i.e., that an injury to "his business or property" was caused by an antitrust violation. (*In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 125 (9th Cir. 1973)) However, the lower federal courts have created an additional antitrust standing requirement based on the phrase "by reason of." This statutory phrase has been interpreted to require not only factual causation but also legal causation (Berger & Bernstein, *An Analytical Framework For Antitrust Standing*, 86 Yale L.J. 809, 811 (1977))

A closer analysis of the various types of standing requirements demonstrates that the legal causation requirement limits recovery to those "whose protection is the fundamental purpose of the antitrust laws." (*In re Multidistrict Vehicle Air Pollution*, 481 F.2d at 125) It has been explained that the courts created the legal causation limitation "primarily out of concern about the excessive penalties that may be incurred because of the mandatory treble damages feature" of Section 4 of the Clayton Act. (Berger & Bernstein, *supra* p. 19, at 812) In footnote 14 of *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 n.14 (1972), this Court recognized that the "lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." However, since this Court has not yet resolved the question of whether legal causation is required for standing in Section 4 damage actions, the Ninth Circuit correctly asserted that it is "not at all clear that the

Supreme Court will ultimately accept these standing limitations":

> "In *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 . . . (1961), the court said that a treble damage plaintiff need show no more than that there was a violation and that plaintiff was injured. The Court has also stated that the lower courts should 'not add requirements to burden the private litigant beyond what is specifically set forth' in the statutes. *Radovich v. NFL*, 352 U.S. 445, 454 . . . (1957)." (*California State Council of Carpenters*, 648 F.2d at 537 n.15)

Recent decisions of this Court interpreting Section 4 of the Clayton Act also cast considerable doubt on the propriety of a legal causation requirement. For example, in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337-38 (1979), this Court asserted:

> "On its face § 4 contains little in the way of restrictive language. In *Pfizer Inc. v. Government of India*, 434 US 308 . . . (1978), we remarked: '"The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* 334 US 219, 236 . . .; cf. *Perma Life Mufflers, Inc. v. International Parts Corp.* 392 US 134, 138-139 . . . And the legislative history of the Sherman Act demonstrates that Congress used the phrase "any person" intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive definition.' *Id.*, at 312 . . ."

The inappropriateness of a legal causation requirement is further underscored by the absence of any legislative history indicating congressional intent to impose such a limitation on the broad, unencumbered language of Section 4. (Berger & Bernstein, *supra* p. 19, at 811-12)

Assuming, *arguendo*, that this Court does adopt a legal causation limitation, the Plaintiffs in the instant case must meet two requirements in order to establish standing under Section 4 of the Clayton Act—*factual* causation and *legal* causation, which have been defined by this Court as follows:

1. Factual Causation

In *Reiter v. Sonotone Corp.*, 442 U.S. 330, 340 (1979), this Court reaffirmed its holding in *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390 (1906), that "monetary injury, standing alone, may be injury in one's 'property' within the meaning of § 4." The Court was careful to distinguish its decision in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972):

> "There we held that injury to a state's total economy, for which the state sought redress in its parens patriae capacity, was not cognizable under § 4. It is true we noted that the words 'business or property' refer to 'commercial interests or enterprises,' and reasoned that Hawaii could not recover on its claim for damage done to its 'general economy' because such injury did not harm Hawaii's 'commercial interests.' 405 US, at 264, 31 L Ed 2d 184, 82 S Ct 885.
>
> However, the language of an opinion is not always to be passed as though we were dealing with language of a statute. Use of the phrase 'commercial interests or enterprises,' read in context, in no sense suggests that only injuries to a business entity are within the ambit of § 4. Respondents ignore the Court's careful use of the disjunctive and the naturally broad meaning of the term 'interests' in *Hawaii v. Standard Oil Co., supra*. The phrase 'commercial interests' was used there as a generic reference to the interests of the State of Hawaii as a party to a commercial transaction. This is apparent from Hawaii's explicit reaffirmance of the rule of *Chattanooga Foundry* and statement that, where injury to a state 'occurs in its capac-

> ity as a consumer in the marketplace' through a 'payment of money wrongfully induced,' treble damages are recoverable by a state under the Clayton Act. *Hawaii v. Standard Oil Co., supra,* at 263 n 14 . . . A central premise of our holding in *Hawaii* was concern over duplicate recoveries. We noted that a 'large and ultimately indeterminable part of the injury to the "general economy"' for which the State sued was 'no more than a reflection of injuries to the "business or property" of consumers' for which, on a proper showing, they could recover in their own right. 405 US, at 263, 264 . . ." (*Reiter*, 442 U.S. at 341-42)

In *Hawaii*, the Court found support for this reading of Section 4 of the Clayton Act in the language and legislative history of 15 U.S.C. § 15a. Section 15a, the only provision authorizing recovery in damages by the United States for antitrust violations, limits that recovery to damages to "business or property."[*] As this Court explained with regard to Section 15a:

> "The legislative history of that provision makes it quite plain that the United States was authorized to recover, not for general injury to the national economy or to the Government's ability to carry out its functions, but only for those injuries suffered in its capacity as a consumer of goods and services.
>
> . . . In light of the language used as well as the legislative history of 15 USC § 15a, it is manifest that the United States cannot recover for economic injuries to its sovereign interests, as opposed to its proprietary functions. And the conclusion is nearly inescapable that § 4, which uses identical language, does not author-

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[*] Section 15a provides in part that "[w]henever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor . . ., and shall recover actual damages by it sustained and the cost of suit." (15 U.S.C. § 15a)

> ize recovery for economic injuries to the sovereign interests of a State." (*Hawaii*, 405 U.S. at 265)

Thus, *Hawaii* involved the rather unique factual situation of a state attempting to sue not only for injuries it suffered in its proprietary capacity, but also as *parens patriae* for injuries to its citizens and the economy of the state. As the Court's opinion makes clear, the interpretation in *Hawaii* of the words "business or property" was specifically geared to respond to concerns raised by this rather unique factual situation. To the extent that the interpretation "commercial interests or enterprises" represented an attempt to narrow the scope of recovery for injury to a state's "business or property," such a limitation is not appropriate in the instant case since the factual situation herein is completely different from that in *Hawaii*.

Even if the Court utilizes the "commercial interests or enterprises" standard in the instant case, the lower federal courts have generally conceded that the interests of unions in antitrust damage actions can come within that standard. For example, in *Tugboat, Inc. v. Mobile Towing Company*, 534 F.2d 1172, 1173-74 (5th Cir. 1976), the Seafarers Union alleged that:

> "the owners of Tugboat, Inc. established and dominated the local bargaining unit of Masters, Mates, and Pilots and have utilized their domination of that union in an attempt to monopolize the local tugboat industry. As alleged, the conspiracy between Tugboat and Masters, Mates, and Pilots allowed Tugboat to prevent Seafarers from organizing Tugboat's employees thus allowing Tugboat to avoid the higher wages and larger crews called for in Seafarer's agreement with Mobile Towing. By reducing costs, Tugboat would be able to run Mobile Towing out of business and monopolize the market."

According to the Fifth Circuit:

> "The interests of a union in being protected from anticompetitive behavior in situations such as that alleged

> by Seafarers can clearly be brought within the injury to 'commercial interests or enterprises' standard. Unions are in the business of representing employees. If their ability to organize workers is injured by a conspiracy involving employers, the union's ability to attract membership and represent employees is weakened.
>
> '[T]here is no reason to exclude the activities of a union from the scope of the word "business." A union is an association which is in the business of representing employees, and thereby it obtains property, hires officials, etc., and this is so regardless of whether or not it is incorporated.' *Asbestos Workers v. United Contractors Association*, 483 F.2d 384, 394 (3rd Cir. 1973), *modified* 494 F.2d 1353 (1974). *Cf. Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed. 2d 626 (1965)." (*Tugboat*, 534 F.2d at 1176)

Similarly, in *International Association of Heat & Frost Insulators v. United Contractors Association*, 483 F.2d 384, 387 (3rd Cir. 1973), *modified*, 494 F.2d 1353 (3rd Cir. 1974), AFL-CIO unions in the building and construction industry alleged that an association of contractors organized and supported a "sham" union in order "to prevent the Unions from representing for collective bargaining purposes employees of the members of the Association and thus to obtain a competitive advantage over employer parties to collective bargaining agreements with the Unions." According to the Third Circuit, the following passage from this Court's opinion in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), "should suffice to show that in the Supreme Court's view a union is also an economic unit with an interest in freedom from illegal restraint, and if it does have such a protectible interest then that interest would be invaded by a restraint, and therefore it would suffer damage to its property or business" (*International Association of Heat & Frost Insulators*, 483 F.2d at 395):

> "For the salient characteristic of [an agreement by a union to favor one set of employers at the expense of another] is that the union surrenders its freedom of action with respect to its bargaining policy. . . . After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy." (*Pennington*, 381 U.S. at 668)

The Third Circuit reasoned that "where a case is made out that there is no labor dispute, . . . there is no reason to hold that a union is any different from any other economic unit in its right to be protected from illegal restraints on its freedom to compete." (483 F.2d at 396-97) The Third Circuit noted that since a union's income is derived from the dues of its members, "it would be contrary to common sense to say that a right to acquire members is not a property right of a labor union" and concluded that the unions were entitled to standing. (*Id.* at 398) In a case "practically identical" to *International Association of Heat & Frost Insulators,* the Sixth Circuit in *Carpenters District Council v. United Contractors Association,* 484 F.2d 119, 123 (1973), *modified,* 539 F.2d 1092 (6th Cir. 1976), followed the Third Circuit's opinion and found that the unions had standing. (*Accord Amalgamated Clothing & Textile Workers Union v. J. P. Stevens & Co.,* 475 F.Supp. 482, 487-88 (S.D.N.Y. 1979), appeal dismissed as moot, 638 F.2d 7 (2d Cir. 1980) ("'Unions are in the business of representing employees.' [Citation to *Tugboat*] Hence, as that case holds, a union has standing to assert a claim that an antitrust conspiracy involving employers damages its ability to attract members."))

Thus, the Ninth Circuit correctly determined in the instant case that:

> "The Unions have met the factual causation requirement by alleging that, due to the AGCC's conspiracy

to establish an industry-wide boycott against all subcontractors with whom the Unions had signed agreements, the Unions have been injured in their business, i.e., organizing carpentry industry employees, negotiating and policing collective bargaining agreements, and securing jobs for their members." (*California State Council of Carpenters*, 648 F.2d at 537)

2. Legal Causation

The courts of appeals have developed three separate tests to determine whether legal causation has been established: the "direct injury" test, the "target area" test and the "zone of interests" test. The "direct injury" test, which was formulated during the early days of private antitrust litigation, permits private actions to be maintained only by those whose injury is considered to be a "direct" or "proximate" result of prohibited anticompetitive activity. (*See* Berger & Bernstein, *supra* p. 19, at 813) Courts applying this test focus principally on the relationship between the alleged antitrust violator and the claimant. Generally, if the claimant is separated from the violator by one or more intermediate levels of antitrust victims, standing is denied by attaching conclusory labels such as "remote," "indirect," "consequential," "incidental" and "derivative." (Berger & Bernstein, *supra* p. 19, at 813; *In re Multidistrict Vehicle Air Pollution*, 481 F.2d at 127)

As it has been explained:

> "[T]he lower federal courts began in the 1950s to treat directness of injury as the sine qua non of antitrust standing. In 1955, for instance, the Second Circuit declared with apparent certitude that '[t]hose harmed only incidentally by anti-trust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed, or who have been directly harmed may recover.' [Citation to *Productive Inventions Inc. v. Trico Prods. Corp.*, 224 F.2d 678, 679

> (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956)] Although the courts subsequently have been obliged to resolve standing issues in a variety of novel factual situations, the analysis of standing questions has, since the 1950s, consistently been carried out under the direct injury rule or some verbal variant thereof." (Footnotes omitted) (Berger & Bernstein, *supra* p. 19, at 818-19)

Berger and Bernstein point out that although the "target area" test is "often said to be distinct from the direct injury rule, in practice most courts treat the target area rubric as a test for directness of injury." (Footnotes omitted) (Berger & Bernstein, *supra* p. 19, at 830) For example, the Ninth Circuit originally developed the target area concept as a test for directness of injury. (Berger & Bernstein, *supra* p. 19, at 830 n. 94, citing *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955); *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952))

The "target area" test focuses on the claimant's relationship to the area of the economy allegedly injured by the defendant. (*In re Multidistrict Vehicle Air Pollution*, 481 F.2d at 127-128) As the Ninth Circuit explained in *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952):

> "[T]o state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws."

Thus, the "target area" approach involves a two-step analysis: "identification of the affected area of the economy and then the ascertainment of whether the claimed injury occurred within that area." (*In re Multidistrict Vehicle Air Pollution*, 481 F.2d at 129) The Ninth Circuit stated in *In re Multidistrict Vehicle Air Pollution:*

> "A proper application of 'by reason of' focuses on whether the anticompetitive conduct directed against an area of the economy injured business operations conducted by the claimant in that sector of the economy." (*Id.*)

The Ninth Circuit uses the "target area" test to determine standing. (*Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 365 (9th Cir. 1955)) Thus standing is established if the plaintiff falls within that area of the economy threatened by a "breakdown of competitive conditions as a result of the alleged antitrust violation." (*Conference of Studio Unions*, 193 F.2d at 54-55; *see also Contreras v. Grower Shipper Vegetable Association*, 484 F.2d 1346 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974) (farmworkers denied standing to sue growers because they were only incidental victims of alleged price-fixing scheme); *accord Gutierrez v. E. & J. Gallo Winery Co.*, 604 F.2d 645 (9th Cir. 1979)) Moreover, plaintiff has standing to sue if its injury was foreseeable. (*In re Western Liquid Asphalt Cases*, 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974))

It has been noted that in the Ninth Circuit the "target area" test "has often been restated as an index of foreseeability." (Berger & Bernstein, *supra* p. 19, at 831) The panel of the Ninth Circuit which decided the instant case invoked the foreseeability formulation of the test: "private antitrust plaintiffs have standing if they are 'within the area of the economy which [defendants] reasonably could have or did foresee would be endangered by the breakdown of competitive conditions.' " (*California State Council of Carpenters*, 648 F.2d at 537-538, quoting *In re Western Liquid Asphalt Cases*, 487 F.2d at 199, and citing

Blankenship v. Hearst Corp., 519 F.2d 418, 425-26 (9th Cir. 1975)) The Ninth Circuit correctly determined in the instant case that under the foreseeability formulation of the target area test, the Respondents' complaint satisfied the legal causation requirement for standing:

> "Based on the facts alleged in the complaint, injury to the Unions' business was more than merely a 'foreseeable consequence' of the AGCC's boycott of union-signatory subcontractors—it was the intended result." (*California State Council of Carpenters*, 648 F.2d at 538)

Even if this Court rejects the Ninth Circuit's foreseeability formulation of the target area test, the Respondents still have standing in the instant case since their complaint also satisfied the traditional target area test which contains no "foreseeability" criterion. The Respondents have standing under the traditional target area test since they were "within the target area of the illegal practices" and were "not only hit, but . . . aimed at." (*Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 365 (9th Cir. 1955))

The Respondents in the instant case acknowledge that unions and employees were denied standing in cases such as *Gutierrez v. E. & J. Gallo Winery Co.*, 604 F.2d 645 (9th Cir. 1979); *Contreras v. Grower Shipper Vegetable Association*, 484 F.2d 1346 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); and *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). However, these cases, which will be distinguished from the instant case *infra*, do not establish that unions and employees lack standing categorically to assert antitrust violations. Rather, as the following cases cited by the Ninth Circuit in *California State Council of Carpenters* make clear, unions and employees have standing when they are within the "target area": *Hennessey v. National Collegiate*

Athletic Association, 564 F.2d 1136, 1147-48 (5th Cir. 1977); *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176-77 (5th Cir. 1976); *International Association of Heat & Frost Insulators v. United Contractors Association*, 483 F.2d 384, 397-98 (3rd Cir. 1973), *modified*, 494 F.2d 1353 (3rd Cir. 1974); *Robertson v. National Basketball Association*, 389 F.Supp. 867, 884-89 (S.D.N.Y. 1975); *Radovich v. National Football League*, 352 U.S. 445 (1957). These cases offer a method of analysis for determining when a plaintiff comes within the target area of the defendant's antitrust activities. The application of that analytical method in the instant case indicates that the Respondents herein were within the target area and therefore have standing to maintain a private antitrust damage action against the Petitioner.

In *International Association of Heat & Frost Insulators*, the Third Circuit applied the "target area" test and analyzed in detail one of the leading cases to enunciate this doctrine, *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955).

In *Karseal*, plaintiff Karseal was the manufacturer of an automobile wax known as "Wax Seal." Karseal sold "Wax Seal" to independent distributors, each of whom resold "Wax Seal" to independent service station operators, from whom the public purchased "Wax Seal" at retail. It was alleged that defendant Richfield, through exclusive dealing arrangements, controlled the choice of petroleum products and automobile accessories to be offered for sale at independent Richfield service stations and thereby prevented the independent distributors from selling Karseal's wax to these service stations. The court posed the question of whether Karseal's business and wax product was within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry and continued as follows:

> "Or in other words, was Karseal within the 'target area' of Richfield's illegal practices, determined in the

> Richfield case? Assuming Karseal was 'hit' by the effect of the Richfield antitrust violations, was Karseal 'aimed at' with enough precision to entitle it to maintain a treble damage suit under the Clayton Act?" (*Karseal,* 221 F.2d at 362)

According to the court "the rule is that one who is only *incidentally* injured by a violation of the antitrust laws,—the bystander who was hit but not aimed at,—cannot recover against the violator." (Emphasis in original) (*Id.* at 363)

Significantly, the court rejected the defendant's argument that since the restraint of trade had been impressed on the individual service station dealers, the distributors of Karseal's wax were one step removed and the plaintiff itself, the manufacturer, was even more removed. Also rejected was the defendant's contention that its exclusive dealing practices were not aimed at either the distributors or the manufacturer. (*Id.* at 364) The court noted:

> "[W]hat was Richfield's violation? It *applied* the illegal restraint at the level of the independent service stations. The restraint was *directed* against the particular products, in their finished form (including Karseal's wax) . . .
>
> Primarily the operation and effect of the illegal practices was on the products (including Karseal's wax) which were competitive to the Richfield sponsored products. The impact was on the market. The gist of the violation was the prevention or impeding of the sale of these competitive products. Logically, . . . the illegal acts were directed against the manufacturers and distributors of the competing products, including Karseal's wax. Such persons and such products were the "target" of the illegal practices.
>
> . . . We need not pass on whether such distributors have a cause of action. But it would appear that both the manufacturer and the independent distributor have such a cause of action." (Emphasis supplied) (*Id.*)

The court concluded that, under the alleged facts of the case, Karseal was "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry" (citing *Conference of Studio Unions*), was "within the target area of the illegal practices of Richfield" and "was not only hit, but was aimed at, by Richfield." (*Id.* at 365)

In *International Association of Heat & Frost Insulators*, as discussed *supra*, AFL-CIO unions in the building and construction industry alleged that an association of contractors organized and supported a "sham" union in order to prevent the unions from representing for collective bargaining purposes employees of the association's members and thereby to obtain a competitive advantage over employers who were parties to collective bargaining agreements with the unions. (483 F.2d at 387) The unions alleged that "the restraint which was applied at the level of the Association's own employees had a purpose to exclude them from competition." (*Id.* at 396) The Third Circuit determined that although competition among labor unions may not ordinarily be the concern of the antitrust laws, where there is no labor dispute a union has the right to be protected from illegal restraints on its freedom to compete. (*Id.* at 396-397) And the Third Circuit ruled that the unions were entitled to standing. (*Id.* at 398)

In the instant case, the alleged illegal restraint was *applied* at the level of the construction subcontractors by means of a group boycott of subcontractors who were signatory to agreements with the Respondents. But the restraint was *directed* against the Respondents and had the purpose of injuring "their business, i.e., organizing carpentry industry employees, negotiating and policing collective bargaining agreements, and securing jobs for their members." (*California State Council of Carpenters*, 648 F.2d at 537) That the restraint was directed against the Respondents is clearly indicated by the fact that only subcontractors who were signatory to agreements with the

Respondents were subject to the group boycott. In other words, the Respondents were actually part of the target of the conspiracy since signing an agreement with the Respondents targeted the subcontractors for the unlawful group boycott and thereby created their competitive disadvantage. Thus, based on the analysis provided in *Karseal*, the Respondents were not bystanders; on the contrary, they were within the target area of the alleged illegal practices of the Petitioner herein and were not only hit, but also aimed at by the Petitioner.

In addition, as in *International Associations of Heat & Frost Insulators*, the Respondents have a right to be protected from the alleged illegal restraints on their freedom to compete. Even though there was no "sham" union in the instant case, the alleged illegal practices of the Petitioner nevertheless had the purpose to exclude the Respondents from competition. In the instant case, the Respondents were in effect prevented from competing against non-union sentiment. The alleged restraints coerced subcontractors, who otherwise may have signed and honored agreements with the Respondents, not to sign such agreements or to try to terminate those agreements that had already been signed. As a result, the Respondents were effectively precluded from convincing these subcontractors to sign and/or honor agreements with the Respondents. In addition, the group boycott excluded the union-signatory subcontractors from competition for construction subcontracts and thereby excluded the Respondents from construction subcontracting. Thus, the Respondents were excluded from competition for construction subcontracting jobs as a result of the group boycott of union-signatory subcontractors.

Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976), involved a factual situation which was nearly identical to that presented in *International Association of Heat & Frost Insulators*. As discussed *supra*, the Seafarers Union alleged that the owners of Tugboat, Inc. established and dominated the local bargaining unit of

Masters, Mates and Pilots in order to prevent Seafarers from organizing Tugboat's employees, "thus allowing Tugboat to avoid the higher wages and larger crews called for in Seafarer's agreement with Mobile Towing. By reducing costs, Tugboat would be able to run Mobile Towing out of business and monopolize the market." (*Tugboat*, 534 F.2d at 1173-74) In *Tugboat*, the Fifth Circuit applied the "target area" test which "limits standing to those persons against whom the conspiracy is aimed." (*Id.* at 1175, citing *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975)) In concluding that the Seafarers Union had standing, the Fifth Circuit reasoned as follows:

> "If, in the case at hand, the complaints were based merely upon loss of employment opportunity resulting from Mobile Towing's loss of business as a consequence of Tugboat's illegal acts, the Seafarers and their members would lack standing. Reading the complaint broadly, however, as must be done in the context of a motion to dismiss for failure to state a cause of action, the Seafarers and their members allege that they were also intended victims of the alleged illegal acts. Their allegations that Tugboat conspired with Masters, Mates, and Pilots to reduce labor costs by preventing Seafarers from providing or representing Tugboat's employees is aimed as much at those parties as it is at Mobile Towing." (Footnote omitted) (*Tugboat*, 534 F.2d at 1176-77)

The Fifth Circuit noted that in *International Association of Heat & Frost Insulators*, as in *Tugboat*, it was "easy to identify the union as falling within the target area. The purpose of the activities of the Contractors Association was aimed at preventing represention of their employees by the plaintiffs." (*Tugboat*, 534 F.2d at 1177) Thus, the injury was not derivative but rather was the direct result of activities aimed at the plaintiffs. (*Id.* at 1177 n. 11)

As in *Tugboat*, reading the complaint broadly, the Re-victims of the alleged illegal acts. The alleged group boycott of subcontractors who were signatory to agreements with the Respondents was aimed at least as much at the Respondents as it was at those subcontractors. The purpose of the activities of the Petitioner was aimed at weakening and destroying the Respondents. Since the Respondents were in the target area and were not only hit but also aimed at, they have standing to sue in the instant case.

Similarly, in *Radovich v. National Football League,* 352 U.S. 445 (1957), *Robertson v. National Basketball Association,* 389 F. Supp. 867 (S.D.N.Y. 1975), and *Hennessey v. National Collegiate Athletic Association,* 564 F.2d 1136 (5th Cir. 1977), the plaintiff employees were within the target area because the alleged unlawful restraints were aimed at them. Since the alleged antitrust violations were directed against these employees, they had standing to sue. While there were no unions involved in these three cases, the cases are consistent with *International Association of Heat & Frost Insulators* and *Tugboat* and support the Ninth Circuit's holding in the instant case that the Respondents are within the target area.

Petitioner, Amicus Pacific Maritime Association (hereinafter "PMA"), Amicus Associated General Contractors of America (hereinafter "AGCA") and the Solicitor General rely on *Conference of Studio Unions v. Loew's, Inc.,* 193 F.2d 51 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952), *Reibert v. Atlantic Richfield Co.,* 471 F.2d 727 (10th Cir.), *cert. denied,* 411 U.S. 938 (1973), *Gutierrez v. E. & J. Gallo Winery Co.,* 604 F.2d 645 (9th Cir. 1979), and *Contreras v. Grower Shipper Vegetable Association,* 484 F.2d 1346 (9th Cir. 1973), *cert. denied,* 415 U.S. 932 (1974), for authority that the Respondents herein lack standing. This reliance is misplaced. As the Third Circuit pointed out in *International Association of Heat & Frost Insulators, Conference of Studio Unions* "anticipated standing in the instant case by negative implication when it detailed its own facts." (483 F.2d at 397) In *Conference of Studio Unions*, the plaintiff unions' members were employees of the defendants, a number of the large motion picture companies, traditionally known as the Majors. The alleged conspiracy between the Majors and a competing union was directed against a competing group of motion picture companies known as the Independents, producers of a comparatively small number of inexpensive films. According to the complaint, the competing union supplied the Majors with skilled help and required the Independents to accept such employees as remained and to employ them at higher rates of pay than charged the Majors. It was also alleged that the Majors discharged members of the plaintiff unions and broke off labor relations with the plaintiff unions. In concluding that the plaintiff unions had not been directly injured by the lessening of competition, the court in *Conference of Studio Unions* reasoned as follows:

> "The entire import of the alleged conspiracy, insofar as competitive conditions are concerned, is the attempt to destroy the Independents. Any restraint on commercial competition would occur in the production of motion pictures and we fail to see how the appellants are in a position to complain about that situation. They are not in the business of producing motion pictures; they do not exhibit motion pictures; they neither compete with the Majors nor purchase from them. In fact, they *are not employees of the companies whom it is alleged the appellees intend to destroy*. The damage alleged to have been suffered by appellants does not flow from any injury to the competitive situation of the motion picture industry, that is, their injury has not arisen from the acts allegedly perpetrated against the Independents." (Emphasis added) (193 F.2d at 54)

The court noted that not one of the acts alleged to have caused injury to the plaintiff unions "effectuated or tended to create a restraint on commercial competition in the motion picture industry." (*Id.*)

In the instant case, the damage alleged to have been suffered by the Respondents does flow from the injury to the competitive situation of construction subcontracting, that is, their injury has arisen from the group boycott allegedly perpetrated against subcontractors who were signatory to agreements with the Respondents. The group boycott both caused injury to the Respondents and "effectuated or tended to create a restraint on commercial competition" in the construction industry. In addition, members of the Respondents herein were employees of the subcontractors whom it is alleged the Petitioner intended to boycott. While the instant case is easily distinguished from the factual situation in *Conference of Studio Unions*, the analysis provided in *Conference of Studio Unions* indicates that the Respondents herein have been directly injured by the lessening of competition and should therefore have standing to sue.

In *Reibert*, employees were discharged following a merger. According to the Tenth Circuit, these employees lacked standing to challenge the legality of the merger since any antitrust violation was not directed against these employees but rather toward the petroleum industry. As the court noted:

> "If there has been a wrong, appellant cannot show that it results from the lessening of competition. Termination of employment will often occur whether a merger is legal or illegal. It is the natural effect flowing from two similarly structured businesses combining their assets to maximize efficiency." (471 F.2d at 731)

Unlike the situation in *Reibert*, and as discussed *supra*, the alleged antitrust violation in the instant case was directed against the Respondents and the harm to the Respondents did result from the lessening of competition in construction subcontracting. Thus, the *Reibert* case also points toward standing for the Respondents herein.

Petitioner, PMA, AGCA and the Solicitor General contend that the concerns expressed by this Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), militate against recovery by the Respondents herein of damages sustained as a result of the alleged antitrust violations. (Brief of Petitioner at 41-42; Brief of AGCA at 15 n.16; Brief of PMA at 26-27; Brief for the United States as *Amicus Curiae* at 28) While the Court raised concerns that have varying degrees of relevance in the instant case, this Court's opinion in *Illinois Brick* does *not* suggest that the Respondents herein should be denied standing.

Despite its recognition that all purchasers in a chain of distribution may suffer injury, this Court held in *Illinois Brick* that, with minor exceptions (*see Illinois Brick*, 431 U.S. at 732 n.12, 736 & n.16), indirect purchasers as a matter of law are not "injured in [their] business or property" within the meaning of Section 4. The Court explicitly declined to offer any guidance concerning standing determinations: "we do not address the standing issue, except to note . . . that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4." (431 U.S. at 728, n.7) The opinion in *Illinois Brick* addressed the former question. The Petitioner's assertion that in *Illinois Brick* the Court expressed "concern that antitrust plaintiffs not be too far removed from the initial impact of the injury" confounds the former question, which was addressed, with the latter question, which was not addressed. (Brief of Petitioner at 41-42)

Petitioner, PMA and the Solicitor General raise several policy considerations, which were addressed in *Illinois Brick*, in support of their contention that the Plaintiffs lack standing: the risk of duplicative recoveries, and the wish not to further complicate treble damage actions. (Brief of Petitioner at 41; Brief of PMA at 27; Brief for the United States at 28) While both are sound policy considerations, the significance of their role in the Court's decision in *Illinois Brick* is far from clear. In addition, denial of standing is too blunt an instrument to promote these interests sensitively. (Berger & Bernstein, *supra* p. 19, at 851)

With regard to the policy against duplicative recoveries, it has been noted:

> "The policy against duplicative recoveries derives from the traditional legal rule against recovery more than once for the same injury, a rule magnified in importance in the antitrust context because double liability for treble damages might oblige the defendant to pay six-fold damages. The policy comes into play in two types of cases: those in which the plaintiff may recover damages in another, simultaneous suit, and those in which multiple plaintiffs' injuries are so inseparable that one plaintiff is likely to recover damages for injuries actually suffered by another. . . .
>
> Avoidance of duplicative recoveries is a sound policy consideration, but denial of standing is too blunt an instrument to promote this interest sensitively. As Congress recently observed, courts have a number of ways, short of denying standing, by which to eliminate the possibility that plaintiffs may enjoy multiple recoveries. Usually the problem can best be assessed—and resolved—after the litigants have had the opportunity to present their case on the merits." (Footnotes omitted) (*Id.* at 850-51)

According to Berger and Bernstein, "[t]he majority in *Illinois Brick* broadly discounted the capacity of procedural devices to overcome the possibility of duplication in chain-of-distribution recoveries. The Court's generalizations seem unwarranted, however; a case-by-case analysis of the value of various procedures would seem preferable to abandonment of them." (Citations omitted) (*Id.* at 862 n.239)

In the chain-of-distribution cases (such as *Illinois Brick*), the potential for duplicative recoveries is very great. In the instant case, however, the potential injuries to Respondents and to other possible plaintiffs (such as subcontractors who have signed agreements with the Respondents) are discrete. The instant case does not present an analogous situation to that in the chain-of-distribution cases where a product is passed from one potential plaintiff purchaser to the next and so on. Here, the Respondents are allegedly injured in their business of organizing employees, negotiating and securing jobs for their members. Recovery by construction subcontractors would not involve duplication. As the Fifth Circuit pointed out in *International Association of Heat & Frost Insulators,* "in the ordinary construction situation, the contractor receives a percentage of the total cost as his own profit margin." (483 F.2d at 397-98) Absent further elaboration of the alleged risk of duplicative recoveries, the concern expressed in the briefs of the PMA and the Solicitor General would appear to be unfounded in the instant case.

With regard to the policy against burdening the courts with typically long and complex antitrust litigation, it has been pointed out:

> "This policy is likely to receive greater attention in light of the Supreme Court's opinion in *Illinois Brick,* which stressed the difficulties of proving passing-on of overcharges in the course of holding that indirect purchasers could not recover treble damages under § 4. Nevertheless, the implications of *Illinois Brick* for standing determinations are far from clear. The Court noted that it was not reaching its result on standing grounds. Moreover, chain-of-distribution cases presented special problems of proof, because in suits involving several levels in the chain all but ultimate purchasers had to establish not only their payment of supra-competitive prices but also their failure to pass-on the overcharges.

> *Illinois Brick* thus does not foreclose the question whether judicial burdens, at least outside chain-of-distribution cases, might be eased as well by expanding the scope of antitrust standing as by narrowing it. Remarking on the liberalization of standing outside the antitrust context, Professor Davis has argued that 'opening the doors to anyone "injured in fact" will not appreciably increase the number of parties who seek to litigate. It will cause an enormous drop in the huge volume of litigation in the federal courts about the complexities of the law of standing.' The same might hold true in the context of antitrust standing: liberalization might simply shift the existing judicial workload from decisions on standing to decisions on the merits.
>
> Even if the judicial burdens policy could be conclusively identified as militating against grants of standing, analysis reflecting this policy would remain problematical. Neither the legislative history of §4 nor judicial opinions in §4 cases suggest how much weight should attach to this policy. The *Illinois Brick* decision, for example, though informed by a concern for adjudicatory problems in chain-of-distribution cases, seemed to view these problems more as burdens on plaintiffs than as burdens on courts." (Footnotes omitted) (Berger & Bernstein, *supra* p. 19, at 855-56)

Berger and Bernstein elaborated on the Court's concern for adjudicatory problems in *Illinois Brick:*

> "*Illinois Brick* stated that *Hanover Shoe's* rejection of the pass-on defense was grounded in concern for the 'costs to the judicial system' incurred in attempts to 'reconstruct [price and output] decisions in the courtroom.' Yet in setting forth its own rationale for barring offensive use of pass-on arguments, the *Illinois Brick* Court seemed to shift its emphasis to the costs that complex antitrust litigation imposes on

> plaintiffs. If offensive pass-on arguments were permitted, the Court reasoned, the consequent multiplicity of indirect purchasers litigating and sharing in antitrust claims, as well as the evidentiary obstacles facing direct purchasers seeking to disprove passing-on, might discourage direct purchasers from bringing § 4 suits at all. This in turn would 'undermine [the] effectiveness' of treble damage actions as an 'important weapon of antitrust enforcement.' Thus the Court's reasoning forced it into the anomalous position of drastically reducing the number of potential antitrust plaintiffs in order to promote deterrence of antitrust violations. In the process, unfortunately, the Court left unclear how the policy against burdening the *judicial* system is related, if at all, to fostering deterrence and what weight the former should be given in its own right." (Citations omitted) (*Id.* at 856 n. 222)

The policy against burdening the courts with complex antitrust litigation does not militate against standing in the instant case. The instant case does not present the special problems of proof involved in the chain-of-distribution cases. In addition, this case reinforces the position that judicial burdens might be eased more by expanding the scope of antitrust standing than by narrowing it. After all, the issue of standing is currently before this Court and the underlying action has yet to be heard on the merits. Furthermore, potential plaintiffs in cases like the instant one will not be discouraged from bringing Section 4 suits if the Respondents are granted standing in the instant case. Thus, this Court's concern in *Illinois Brick* that a multiplicity of indirect purchasers serving as plaintiffs might discourage direct purchasers from bringing Section 4 suits at all is not applicable in the instant case. In sum, as has been pointed out:

> "[O]n a case-by-case basis, there is much that courts can do, short of denying standing to entire classes of

> antitrust victims, to resolve the problems identified by the *Illinois Brick* Court. Neither worst-case analyses nor generalizations about intractability serve the purposes of § 4." (*Id.* at 878)

The Solicitor General contends that "the speculative character of the damages sought militates against permitting standing for the" Respondents. (Brief for the United States at 28) As an example of "the speculative character of the plaintiff's damages," the Solicitor General points to "the difficulty—apparent on the face of the complaint—of linking the alleged losses to the violation in question." (*Id.* at 6) However, this consideration is simply irrelevant to the issue of standing. With regard to the policy against speculative recoveries, it has been noted:

> "The policy against speculative recoveries has been mentioned only occasionally as militating against grants of antitrust standing. If considered properly, the policy should play no part whatsoever in the standing inquiry. To deny standing on grounds of speculative injury is to prejudge the merits of the plaintiff's claim for damages, for speculativeness of injury implies inability to prove that injury exists. But issues of adequacy of proof are ordinarily handled through motions for summary judgment or for directed verdict. An antitrust plaintiff should not be denied an opportunity to present all its evidence on causation and extent of injury before the court rules on whether its allegations are sufficient as a matter of law; indeed, such a denial is contrary to accepted notions of civil procedure. [*Cf. Conley v. Gibson,* 355 U.S. 41, 45-46 (1957) (complaint should not be dismissed for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to relief"). A standing barrier based on potential speculativeness of injury would conflict with the Supreme Court's liberal view of the quantum of

> evidence needed to go to the jury on questions of injury and damages. *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123-24 (1969); *Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264-65 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 562-63 (1931).] Because the problem of speculative recoveries is irrelevant to the legal issue of which parties may bring an antitrust claim to trial, it will not be considered further in this formulation of a policy approach to standing." (Footnotes omitted) (Berger & Bernstein, *supra* p. 19, at 854-55)

PMA, AGCA and the Solicitor General also contend that the reasoning of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977), is directly applicable in this case. (Brief of PMA at 24; Brief of AGCA at 15 n.16; Brief for the United States at 26 n.23) As will become clear *infra,* the Court's decision in *Brunswick* does not foreclose the Respondents from bringing the instant lawsuit. In *Brunswick,* respondent bowling centers alleged that the petitioner, one of the country's two largest bowling equipment manufacturers and the largest operator of bowling centers, had violated the antimerger provisions of Section 7 of the Clayton Act, 15 U.S.C. § 18, by acquiring competing bowling centers that had defaulted in payments for equipment purchased from the petitioner. Section 7 proscribes mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly." The respondents sought treble damages pursuant to Section 4 as well as injunctive and other relief. To establish damages, the respondents attempted to show that had the petitioner allowed the defaulting centers to close, the respondents' profits would have increased. (*Brunswick,* 429 U.S. at 481)

This Court noted in *Brunswick* that Congress has condemned mergers "only when they may produce anticompetitive effects." (*Id.* at 487) This Court characterized the case in the following terms:

> "If the acquisitions here were unlawful, it is because they brought a 'deep pocket' parent into a market of 'pygmies.' Yet respondents' injury—the loss of income that would have accrued had the acquired centers gone bankrupt—bears no relationship to the size of either the acquiring company or its competitors. Respondents would have suffered the identical 'loss'—but no compensable injury—had the acquired centers instead obtained refinancing or been purchased by 'shallow pocket' parents . . .
>
> . . . At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for 'the protection of *competition*, not *competitors*,' *Brown Shoe Co. v. United States*, 370 US, at 320 . . . It is inimical to the purposes of these laws to award damages for the type of injury claimed here." (*Id.* at 487-88)

The Court held that in order to recover treble damages based on Section 7 violations, plaintiffs must prove "antitrust injury": "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." (*Id.* at 489) In other words, "[t]he injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." (*Id.*)

Based on the foregoing, it would appear that *Brunswick* is limited to treble damage actions for violations of Section 7 of the Clayton Act. (*But see Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1234 (6th Cir. 1981), *cert. denied*, Nos. 80-2222 and 81-218 (Oct. 13, 1981) ("we interpret *Brunswick* to mean that the pleading of 'antitrust injury' is an essential component of standing under § 4 of the Clayton Act")) Since the Respondents herein do not seek "to recover treble damages on account of § 7 violations" (*Brunswick,* 429 U.S. at 489), the analysis in *Brunswick* is simply inapposite to the standing determination in the instant case and the Ninth Circuit was correct in failing to consider it. (In the instant case, of course, the Respondents allege a violation of Section 1 of the Sherman Act which provides in part that "[e]very . . . conspiracy, in restraint of trade or commerce . . . is . . . illegal.") Similarly, the Ninth Circuit's decision in *John Lenore & Co. v. Olympia Brewing Co.,* 550 F.2d 495 (9th Cir. 1977), also cited by the PMA and the Solicitor General (Brief of PMA at 26; Brief for the United States at 25 n. 21), is irrelevant to the question of standing in the instant case. *John Lenore & Co.,* like *Brunswick,* elaborates "the requirements that a plaintiff must meet before being allowed a damage recovery due to a § 7 violation." (*John Lenore & Co.,* 550 F.2d at 498)

If, however, this Court interprets *Brunswick* to mean that the pleading of "antitrust injury" is a requirement for standing under Section 4 of the Clayton Act, the Respondents in the instant case have satisfied this requirement. As discussed *supra,* the injury to the Respondents' business of organizing employees, negotiating and securing jobs for their members is the type of injury the antitrust laws were intended to prevent and this injury flows from the unlawful group boycott directed against union subcontractors. The Respondents' injury is attributable to the breakdown of competitive conditions in the construction subcontracting market. (*Chrysler Corp.,* 643 F.2d at 1235) Thus, the Respondents have alleged "antitrust injury."

The Respondents also have standing under the "zone of interests" test. In *Malamud v. Sinclair Oil Corp.,* 521 F.2d 1142, 1151-52 (6th Cir. 1975), the Sixth Circuit's formulation of this test requires that the interest which the plaintiff seeks to protect is arguably within the zone of interests protected by the relevant antitrust laws. According to the Sixth Circuit, both the direct injury test and the target area test "demand too much from plaintiffs at the pleading stage of the case . . . [B]y using either approach a court is enabled to make a determination on the *merits* of a *claim* under the guise of assessing the *standing* of the *claimant.*" (Emphasis in the original) (*Malamud,* 521 F.2d at 1149-50) The "zone of interests" test "is perhaps best seen as providing an opportunity beyond the pleading stage for the introduction of facts sufficient to carry out an informed inquiry into the merits of a claim of substantive antitrust protection." (Berger & Bernstein, *supra* p. 19, at 842 n. 150)

Berger and Bernstein have assessed the effect of *Malamud* as follows:

> "By referring to the 'interests' to be protected, the *Malamud* court invited attention to the reach of the underlying policies sought to be enforced, not to whether the antitrust plaintiff was injured with sufficient directness to enforce them. In effect, the court repudiated any proximate cause limitation on antitrust standing and required only that a party be protected by the substantive law." (*Id.* at 838-39)

In *Chrysler Corp.,* 643 F.2d at 1233, the Sixth Circuit acknowledged this repudiation. And, as the Ninth Circuit pointed out in *California State Council of Carpenters:*

> "[T]he zone of interests approach appears to embody a fundamental concern for the policies underlying the antitrust laws and Congress's purpose in creating a private antitrust damage action. That purpose appears to have been twofold: (1) to provide a meaningful compensatory remedy for private harm, and (2) to provide effective enforcement and deterrence by encouraging private parties to bring some of the suits not brought by the government." (648 F.2d at 538 n. 18)

In the instant case, the Respondents seek to protect their business of organizing employees, negotiating and securing jobs for their members. As discussed *supra*, a union is an economic unit. In the instant case, the Respondents suffered economic loss as a result of the alleged antitrust violations. As a result, the interests which the Respondents seek to protect fall "arguably within the zone of interests" protected by the Sherman and Clayton Acts.

In addition, granting standing to the Respondents herein furthers not only the compensation policy but also the deterrence policy of Section 4 of the Clayton Act. (*Pfizer Inc. v. Government of India*, 434 U.S. 308, 314 (1978); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485. *See generally*, Berger & Bernstein, *supra* p. 19, at 845-58) It may be that the Respondents are the only entities in the instant case available to bring suit, that is, having the resources and the motivation to do so. (*International Association of Heat & Frost Insulators*, 483 F.2d at 397) As the Ninth Circuit pointed out in *California State Council of Carpenters*, "[c]ompanies whose business interests are immediately affected by an antitrust violation may not sue because of their stake in an ongoing commercial relationship with the violator." (648 F.2d at 539 n.19) This possibility is especially significant since "the deterrence policy promoted by § 4 should be a primary consideration in a court's antitrust standing inquiry." (Berger & Bernstein, *supra* p. 19, at 850)

The Solicitor General acknowledges that "it is not clear that the [unionized] subcontractors would be motivated to sue" (Brief for the United States at 29 n.25) since "[t]here may be circumstances in which that group will feel inhibited, because of contractual arrangements or other links to the potential defendants, from bringing suit" (*id.* at 27 n.24). To remedy this situation, the Solicitor General suggests that "[i]f . . . the unionized firms were to respond to the alleged boycott by breaching their collective bargaining agreements with the Unions . . . , the Unions might, through vigorous pursuit of their breach of contract remedy under Section 301 of the LMRA, 29 U.S.C. 185, increase the incentive of the unionized firms to consider invoking the antitrust remedy against the entity responsible for squeezing them out of the subcontracting market because of their adherence to the bargaining agreement." (*Id.* at 29 n.25) Respondents submit that the Solicitor General's suggestion provides a totally unsatisfactory solution and its inadequacy underscores the importance of granting standing to the Respondents in the instant case. The proposition that a suit against the unionized firms for breach of contract will motivate them to sue the antitrust violator(s) not only is an extremely awkward method by which to enforce this nation's antitrust laws but also ignores the economic and contractual realities in the construction industry. Many unionized firms will respond to the alleged boycott not by breaching their collective bargaining agreements but rather by setting up double-breasted operations or shifting more of their resources to the non-unionized part of their operations when double-breasted operations already exist. In this manner, unionized subcontractors can avoid losing any business and, as a result, these subcontractors will *not* "possess the classic economic incentive to file suit." (*Id.* at 28 n.25) Alternatively, unionized subcontractors may simply not renew the collective bargaining agreement when it expires. In that event, Respondents will not have the leverage of a breach of contract suit. The Solicitor General's proposed method of enforcing the antitrust laws also fails to deal with the coercive effect that the alleged boycott will have on non-unionized subcontractors to remain non-union. Non-unionized subcontractors, which otherwise would have signed an agreement with the Respondents, will respond to the boycott by remaining non-union. These examples make clear that the Respondents may very likely be the *only* potential plaintiffs with the incentive to invoke the antitrust remedy against the Petitioner.

Thus, the Respondents herein have established legal causation and therefore have standing. This result is the same whether the Ninth Circuit's foreseeability formulation of the target area test, the traditional target area test or the "zone of interests" test is utilized.

IV
CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals for the Ninth Circuit in this case must be affirmed. The decision in that case determines a method by which unions can live with *Connell*. If *Connell* is to remain the rule, then it must be applied equally—the *Connell* sword must have two edges. A reversal of the Ninth Circuit's decision in this case would leave the employer not merely with remedies under both the labor and antitrust laws in a *Connell*-type situation, but would grant it a shield in the same type of factual situation when a union is the victim of the same type of restrictive acts and seeks the same type of remedy.

Respectfully submitted,

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Petitioner's
Reply Brief

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No. 81-334

IN THE

Supreme Court of the United States

October Term, 1982

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,
Petitioner,

vs.

CALIFORNIA STATE COUNCIL OF CARPENTERS and CARPENTERS 46 NORTHERN COUNTIES CONFERENCE BOARD,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

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Respondents.

REPLY BRIEF OF PETITIONER.

I.
INTRODUCTORY STATEMENT.

The purpose of this Reply Brief is to respond to the arguments raised by the Respondent, the Solicitor General, and amicus curiae AFL-CIO in their briefs in this action, and to discuss cases handed down by the Court since Petitioner briefed this case in February, 1982.

For convenience and brevity, Petitioner Associated General Contractors of California, Inc. is referred to in this brief as "AGC." Respondents California State Council of Carpenters and Carpenters 46 Northern Counties Conference Board are referred to jointly as the "Union."[1]

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[1] At various points in this brief, reference is made to the briefs filed by various other parties in this action. Those references marked "Pet. Br." are the Petitioner's Opening Brief; those references marked "Resp. Br." are Respondent's Brief; those references marked "S.G. Br." are to the brief filed by the Solicitor General on behalf of the United States; those references marked "AFL-CIO Br." are to the amicus curiae brief of the AFL-CIO.

II.
ARGUMENT.

A. The Union's Complaint Fails to State a Claim Cognizable Under the Sherman Act.

The central issue in this case is whether the First Amended Complaint filed by the Union states any claim for relief under the Sherman Act, 15 U.S.C. §1.

The Union and the Solicitor General seem to suggest that a "boycott" is always actionable under the Sherman Act if it has some potential impact in the marketplace outside the collective bargaining unit. (S.G. Br., p. 13.) The short answer to this assertion is that both the decisions of this Court and the Circuit Courts have recognized that some types of "boycott" activity are outside the scope of the Sherman Act even though they may have some potential market effect. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961); *Hunt v. Crumboch*, 325 U.S. 821, 65 S.Ct. 1545 (1945); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S.Ct. 982 (1940); *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges & Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir. 1970); *State of Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980), *affirming* 467 F. Supp. 289 (W.D. Mo. 1979);[2] *International Longshoremen's Ass'n. v. Allied International*, 640 F.2d 1368 (1st Cir. 1981), *aff'd on other grounds*, 102 S.Ct. 1656 (1982).

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[2] The Eighth Circuit's decision in *State of Missouri v. National Organization for Women*, 620 F.2d 1301 (8th Cir. 1980) contains an extensive discussion of the background and purposes of the Sherman Act. In that case, the court found the Sherman Act inapplicable to a boycott of state convention facilities designed to pressure the State of Missouri to ratify the Equal Rights Amendment.

The Union relies upon the oft-cited dictum from *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S.Ct. 996, 1006 (1948), that the Sherman Act "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." But what are the "forbidden practices" from which victims are protected? Surely, after *Apex Hosiery v. Leader, supra*, and *Hunt v. Crumboch, supra*, it cannot be seriously argued that ordinary labor disputes are within the covered category.

The Solicitor General argues that the allegation that AGC and its members "coerced . . . owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with [the Unions]" alleges "some form of group boycott" which is actionable under the Sherman Act. (S.G. Br., pp. 9-10.) This assertion highlights the critical reason why the approach taken by the Ninth Circuit in this case is completely inimical to the need to accommodate the competing interests of federal labor and antitrust laws. The very essence of a collective bargaining relationship is the creation of a legally sanctioned "boycott." The employer agrees to recognize one organization (and exclude others) as a representative of its employers; it may agree (at least in the construction industry) to subcontract jobsite work only to other employers with appropriate bargaining agreements; (*Woelke & Romero Framing, Inc. v. NLRB*, ____ U.S. ____, 102 S.Ct. 2071 (1982); it may agree to hire only employees who will agree to be Union members (or at least pay Union dues); *NLRB v. Hershey Foods*, 512 F.2d 1083 (9th Cir. 1975).) Similarly, the use of economic strikes and lockouts by employers and Unions to coerce each other to yield to labor-related demands are a form of sanctioned "boycott" activity. The injection of traditional antitrust "boycott" analysis into this complex framework of federal labor law is certain to generate unpredictable and untoward results. *See*, Handler and Zifchak, Collective Bargaining and the Antitrust Laws, 81 Col. L. Rev. 459, 486 (1981).

The Solicitor General appears to agree that there is a sphere of unilateral employer conduct vis a-vis a union with which it has a collective bargaining agreement as to which the antitrust laws should not apply. (S.G. Br., pp. 3-4.) However, the Solicitor General insists that antitrust sanctions and traditional antitrust boycott analysis *may* be applied to the "allegations of coercion directed against the Union-signatory contractors and subcontractors." (S.G. Br., p. 11.) We believe this overlooks the fact that a labor dispute inevitably will impinge, to some degree, upon the activities of non-parties to the labor dispute. The federal labor laws attempt, in various ways, to limit and control "secondary" activities directed at non-disputants; see 29 U.S.C. §158(e); 29 U.S.C. §158(b)(4); 29 U.S.C. §187. If these remedies are inadequate, the appropriate solution is to revise the labor laws rather than apply sanctions borrowed from other fields of law.

In this case, *each* of the activities alleged in paragraph XXIV of the First Amended Complaint is claimed to be part of a combination and conspiracy to undermine, weaken and destroy the collective bargaining relationship between AGC and the Union. (Complaint, Par. XXIII.) Seen in this context, it is clear that the isolated portions of paragraph XXIV with which the Solicitor General is concerned are simply a part of a larger matrix of activities allegedly designed to rupture a long-standing collective bargaining relationship.

According to the Solicitor General's argument, AGC's activities vis-a-vis nonmember letters of construction contracts is outside the "labor dispute" context, because "the persons whom AGCC and its members are accused of boycotting are not parties to any labor dispute; they are firms excluded from the subcontracting market because they happen to adhere to Union contracts." (S.G. Br., p. 13.)

Petitioner submits that this reading of the term "labor dispute" is unrealistically restrictive and contrary to the case law of this Court. This Court just affirmed, last term, that the term "labor dispute" as used in the Norris-LaGuardia Act, is to be given a broad interpretation. See *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*, ____ U.S. ____, 102 S.Ct. 2673 (1982). This is consonant with earlier decisions of this Court, including *U.S. v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463 (1941) in which the Court held that the anti-injunction provisions of the Norris-LaGuardia Act applied to a "labor dispute" arising between two rival unions. By parity of reasoning, AGC's efforts to encourage (or even coerce) nonmember employers to go along with its supposed policy of not subcontracting with Union-signatory employers is nothing more than activity designed to further the labor policies it wishes to follow, and is equally protected.

Significantly, *Hutcheson* cautions that the Norris-LaGuardia Act "must not be read in a spirit of mutilating narrowness." 312 U.S. at 235, 61 S.Ct. at 467. Moreover, this Court's recent decision in *Jacksonville Terminals* affirms that a "labor dispute" may encompass disputes with parties who are not directly involved in the immediate collective bargaining relationship. In *Jacksonville Terminals*, this Court held that the Norris-LaGuardia Act precluded the issuance of an injunction to stop a strike initiated because of a union's desire to protest the Soviet Union's invasion of Afghanistan. If a union's desire to take economic action to express its views on such a matter of foreign policy is protected by the Norris-LaGuardia Act, surely an employers' association's efforts to further its labor policies by encouraging others not to use Union labor must enjoy the same protection.[3]

Petitioner does not contend, of course, that it can carry out *any* anti-competitive act just because such act would benefit its posture vis-a-vis a union with which it has a collective bargaining relationship. However, the Complaint in this action does not allege price fixing, territorial divisions, or other direct market restraints. All that is alleged is that AGC and its members encouraged or coerced letters of construction contracts to award contracts to non-Union businesses, and encouraged and coerced contractors not to enter into collective bargaining agreements with the Union. While these practices could be brought within the expansive concept of a "boycott," it is at once apparent that they are far different from the economic boycotts with which this Court dealt in cases such as *Fashion Originators Guild v. Federal Trade Commission*, 312 U.S. 457, 61 S.Ct. 703 (1941) and *American Medical Association v. United States*, 317 U.S. 519, 63 S.Ct. 326 (1943).[4]

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[3] In an earlier decision, the Ninth Circuit rejected the proposition that anti-competitive acts engaged in by parties to a collective bargaining agreement are actionable under the Sherman Act simply because they have an adverse economic effect upon third parties. In *California Dump Truck Owners Association, Inc. v. Associated General Contractors of America, San Diego Chapter, Inc.*, 562 F.2d 607 (9th Cir. 1977) the Circuit held that employers who were excluded from the marketplace through the operation of the provisions of a collective bargaining agreement could not state a claim for relief under the Sherman Act, where the collective bargaining agreement appeared to be otherwise lawful. The only difference between *California Dump Truck* and the present case is that in the former the union and signatory employers were acting cooperatively to place an alleged "restraint" on the market, while in the present case, the employers are acting unilaterally (but nevertheless in furtherance of their labor policy) in a manner which may have financial repercussions upon third parties.

[4] The Solicitor General notes that "an antitrust conspiracy may be unlawful because of the means used, even if the end is lawful." (S.G. Br., p. 12, citing this Court's opinion in *Connell Construction Co. v. Local 100*, 421 U.S. 616, 95 S.Ct. 1830 (1975)). Petitioner agrees with this statement, but is impelled to note that it completely misses the point of this case. The question is not whether the alleged activities undertaken by AGC and its members may be "unlawful," but what body of federal law will be applied to determine whether specific acts are unlawful.

It is now recognized that members of a multiemployer bargaining unit have the right to meet, strategize, formulate labor policy and otherwise act in unison in carrying out a labor policy. See *Charles D. Bonanno Linen Service v. N.L.R.B.*, ____ U.S. ____, 102 S.Ct. 720 (1982). It seems perfectly appropriate for such employers, and their association, to stimulate competition in the marketplace by encouraging "letters of contracts" to offer contracts to open shop contractors. This will have the beneficial effect of keeping unions from making unreasonable wage demands; the unions will necessarily realize that if labor costs of union employers become markedly higher than those of open shop employers, a major shift of work from organized to open shop employers may occur. The Ninth Circuit opinion would impose potential antitrust liability for such conduct.

The Solicitor General also implies that this Court's decision in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S.Ct. 982 (1940) may no longer represent a valid approach to analyzing the applicability of the Sherman Act to union-employer conflicts. (S.G. Br., p. 8, n.5.) The Solicitor General suggests that this Court's decision in *United States v. Hutcheson*, 312 U.S. 219 (1941), which focuses on the application of the statutory exemption of the Norris-LaGuardia Act to such conflicts, represents a more valid approach to analyzing such claims. This contention prompts three responses: First, there is nothing inconsistent in the *Apex Hosiery* and *Hutcheson* rulings. Indeed, Justice Frankfurter, who authored *Hutcheson*, was part of the majority in *Apex*, while Justice Stone, the author of *Apex*, concurred in *Hutcheson*. Chief Justice Hughes and Justice Roberts, who dissented in *Apex*, also dissented in *Hutcheson*. Frankfurter's opinion in *Hutcheson*, in fact, cities to Justice Stone's opinion in *Apex Hosiery*.

Second, the application of the statutory labor exemptions, as discussed in *Hutcheson*, is one of the issues raised by this case, and one which the Court is free to consider. One of the issues on which the Court granted certiorari in this case is "Whether Section 20 of the Clayton Act, 29 U.S.C. §52, shields employers from liability under the federal antitrust laws for concerted activities undertaken unilaterally against a union with which the employers have a collective bargaining relationship."

Finally, the implication that *Apex Hosiery* is no longer good law is somewhat surprising, since, as the Solicitor General admits, *Apex* has been cited by this Court in recent cases (*e.g.*, *H.A. Artists & Associates v. Actors Equity Association*, 451 U.S. 704, 715 n.16 (1981)) and because it has been the foundation of many decisions in the District Courts and Courts of Appeal in which claims similar to those at issue in this case arose; see *e.g.*, *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers of America, AFL-CIO*, 431 F.2d; 1004 (5th Cir. 1970); *Kennedy v. Long Island Railroad Company*, 319 F.2d 366 (2d Cir. 1963); *Amalgamated Meat Cutters v. Wetterau Foods*, 579 F.2d 133 (8th Cir. 1979).[5]

B. The Connell Decision Does Not Support, Let Alone Compel, the Result Reached by the Ninth Circuit.

The Union asserts that this Court's decision in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 95 S.Ct. 1830 (1975) compels this Court to find the petitioner potentially liable for advocating, encouraging and coercing "owners of land and other letters of construction contracts" to hire non-Union contractors and subcontractors. Because a union was held potentially liable under the antitrust laws in *Connell* for forcing a contractor with which it had no collective bargaining relationship to sign a restrictive subcontracting agreement, the Union contends that "similar" employer conduct must also be subject to antitrust scrutiny.

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[5] It is noteworthy that this Court in *Connell Construction Company, Inc. v. Plumbers & Steamfitters Local No. 100, supra*, referred, with apparent approval, to the Court's earlier holding in *Apex Hosiery*. "Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage *but also by adjusting the scope of the antitrust remedies themselves. See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940)." 95 S.Ct. at 1842, 421 U.S. at 636. [Emphasis supplied.]

The first fundamental error in this argument is that the present situation does not resemble that which the Court faced in *Connell*. Unlike *Connell*, AGC and its members have a long-standing collective bargaining relationship with the Union, and the Union has many remedies which it may employ if it believes that AGC and its members are subverting that collective bargaining relationship. *See* Pet. Br. p. 15, n. 7.[6]

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[6] This Court has recently recognized the extremely limited nature of the holding in *Connell*:

> "In *Connell*, the Court was confronted with a novel and apparently foolproof organizational tactic: 'stranger' picketing aimed at pressuring employers with whom it had no collective bargaining relationship, and whose employees it had no interest in representing, into signing union signatory subcontracting agreements. Because there was no recognitional objective to the picketing, it did not violate §8(b)(7), 29 U.S.C. §158(b)(7)." *Woelke and Romero Framing, Inc. v. NLRB*, ___ U.S. ___, 102 S.Ct. 2071, 2076-77, n. 8 (1982).

The District of Columbia Court of Appeals took explicit note of the apparent ineffectiveness of the federal labor laws in controlling the Union conduct at issue in *Connell*:

> ". . . the union in *Connell* sought to avoid the reach of *Dallas Building and Construction Trades Council* and §8(b)(7). Since there was no recognitional objective to the picketing, the picketing could not violate §8(b)(7). Since the subcontracting clause appeared to be protected by the construction industry proviso to §8(e), the picketing could not violate §8(b)(4)(A). Thus, the union appeared to have found a means by which it could apply unlimited pressure upon contractors to subcontract only with firms who were signatory to agreements with the union." *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 871 (D.C. Cir. 1980).

The only potential "labor" remedies available in *Connell* were those provided under the anti-"hot cargo" statutes passed by Congress in 1959.

The *Connell* court noted that the provisions added to federal labor law by the Labor Management Reporting and Disclosure Act in 1959 were accompanied by "no legislative history . . . suggesting that labor law remedies for §8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NRLA." 421 U.S. at 636, 95 S.Ct. at 1830. By contrast, the *Connell* court takes explicit note of the legislative history of the 1947 Taft-Hartley amendments to federal labor law. 421 U.S. at 633-34. "Congress rejected attempts to regulate secondary activities by repealing the antitrust exemptions in the Clayton and Norris-LaGuardia Acts, and created special remedies under the labor law instead." *Id.*

The second distinguishing feature of *Connell* is that it involved a *combination* between a union and an employer to indiscriminately exclude non-union subcontractors from bidding for subcontracts on Connell's jobs.[7] This Court held that such an agreement was outside the nonstatutory exemption to federal labor laws, because it involved a direct restraint on the business market. The *Connell* Court was careful to note, however, that a union could *unilaterally* act to impose some market restraints. See *Connell*, 95 S.Ct. at 1835, citing *Federation of Musicians v. Carroll*, 391 U.S. 99, 88 S.Ct. 1562 (1968).

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[7] The facts of the *Connell* case resemble the situation treated by this Court in *Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797, 65 S.Ct. 1533 (1945). In *Allen Bradley*, this Court held that a conspiracy between a union and certain employers and suppliers in the electrical industry in the New York City area was not immune from antitrust sanctions simply because a collective bargaining agreement existed between the union and covered employers. The same type of direct control over the market is exhibited by the facts in *Connell* where the court noted: "Local 100 thus might be able to create a geographical enclave for local contractors, similar to the closed market in *Allen Bradley*, *supra*."

The facts of the present case are analogous to those in *Carroll*, rather than those in *Connell*. In the present case, employers are acting *unilaterally* to protect their self-interest by agreeing among themselves and by encouraging and inducing other employers to award subcontracts to non-Union employers.

Other courts have rejected the assertion that unilateral employer conduct of the type described in this complaint contravenes this Court's decision in *Connell*; see *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co., Inc.*, 475 F.Supp. 482 (S.D.N.Y. 1979); *Carpenters Local 1846 v. Pratt-Farnsworth*, 511 F.Supp. 509 (E.D. La. 1981).

A further distinguishing feature of *Connell* is that there only the *non*-statutory labor exemption could be claimed by the union as a defense to imposition of antitrust sanctions. The statutory exemption provided by the Clayton Act and the Norris-LaGuardia Act was clearly not available because the Union was not acting unilaterally.

In the present case, the Ninth Circuit recognized the potential applicability of the statutory labor exemptions afforded by the Clayton Act and the Norris-LaGuardia Act, though it rejected their application because of their "pro-labor" purpose. 648 F.2d at 533.

The touchstone of the *Connell* decision is the court's determination that Local 100's agreement with Connell had "a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." The Union cannot plausibly contend, in the present case, that the encouragement, inducement or coercion of landowners and others who let construction contracts to award them to open shop contractors has any potential for "restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions."[8] 95 S.Ct. at 1841. Instead, such activity will *preserve* competition by insuring that open shop contractors are considered for contracting opportunities when they arise. As the dissenting judge below perceived, the true purpose of the Union in bringing this action is to terrorize those who might encourage contracting in the open shop sector with the possibility of antitrust litigation. 648 F.2d at 541.

Moreover, the union in *Connell* had the power to shut any prospective subcontractor out of the bidding entirely on Connell projects by simply refusing to sign a collective bargaining agreement with that contractor. It is not alleged here (nor could it truthfully be alleged) that the AGC and its members have any power to *preclude* Union contractors from bidding on the contracts let by nonmembers. Thus, it is clear that AGC and its members have no "power" comparable to that which was exercised by the union in *Connell*.

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[8] The fact that a landowner may insist upon signing a collective bargaining agreement with an open shop contractor does not necessarily deprive Union workers of jobs, nor does it necessarily exclude certain contractors from the market. As this Court noted in *Woelke & Romero v. NLRB*, ___ U.S. ___, 102 S.Ct. 2071 (1982), a contractor signed to a "prehire" collective bargaining agreement, which is legal under §8(f) of the National Labor Relations Act in the construction industry, may simply repudiate that agreement at any time before the Union has demonstrated that it represents a majority of the employer's workmen. Thus, a unionized contractor could qualify for non-union jobs by utilizing a "prehire" agreement as its vehicle for collective bargaining with the union. The agreement could be repudiated if and when the contractor obtains an "open shop" job.

Similarly, it is an unfair labor practice for an employer to discriminate against Union workmen in hiring personnel. (See Pet. Br., p. 45.) Thus, employees who are members of labor unions are free to obtain jobs with "open shop" contractors, or to continue with their current Union employer after that employer repudiates its collective bargaining agreement.

In *Connell*, by contrast, an employer excluded from collective bargaining by the Union would simply be unable to bid for work on one of Connell's projects.

Finally, it should be noted that the *Connell* court examined a "most favored nations" clause which the union in *Connell* had entered into with a local contractor's association. As a practical matter, the union in *Connell* had foresworn its right to "bargain" with outside contractors over terms and conditions of employment.[9] The *Connell* court noted that "the Union thus had complete control over subcontract work offered by general contractors that had signed these agreements." AGC and its members have no similar power under the facts of this case.

C. The Conduct Alleged in the First Amended Complaint Falls Within the Statutory Labor Exemption.

Significantly, Respondents do not challenge any of the legislative history or materials cited in Petitioner's Opening Brief in support of the proposition that the statutory exemptions afforded by the Clayton Act and the Norris-LaGuardia Act apply to unilateral labor-related activities of employers, as well as unions.[10] Nor do the Respondents challenge Petitioner's contention that multiemployer bargaining, which necessarily involves concerted unilateral labor-policy formulation among employers, enjoys the approval of this Court; see *Charles D. Bonanno Linen Service v. NLRB*, ____ U.S. ____, 102 S.Ct. 720 (1982); *NLRB v. Brown*, 380 U.S. 278, 85 S.Ct. 980 (1965).[11]

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[9] *See Connell*, 95 S.Ct. at 1836 n.1 ["The primary effect of the agreement seems to have been to inhibit the Union from offering any other employer a more favorable contract."].

[10] The Solicitor General asserts that AGC did not raise the issue of the application of the statutory exemptions in proceedings in the courts below. Apparently the Ninth Circuit thought otherwise: "Even if this alleged conduct violated Section 1 of the Sherman Act, the AGCC argues that it could not be held liable for such a violation by virtue of labor's exemption from the antitrust laws." 648 F.2d at 532. Moreover, one of the issues on which this Court granted certiorari was the applicability of Section 20 of the Clayton Act to the allegations set forth in the First Amended Complaint in this case. Finally, it scarcely needs to be added that the question of subject matter jurisdiction is never waived in a federal court proceeding. *See, e.g., Firestone Tire & Rubber Co. v. Risjord*, ____ U.S. ____, 101 S.Ct. 669 (1981).

Instead, the Union contents itself with a recitation of the familiar rule, first announced in *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 65 S.Ct. 1533 (1945) that union-employer combinations to impose direct restraints upon the marketplace are not exempt from antitrust sanctions. As Petitioner made clear in its Opening Brief, Petitioner has no quarrel with the holdings of such cases as *Allen Bradley, supra* and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965), which preclude employers and unions from using their collective bargaining relationship as a "shield" when they combine to impose naked restraints of trade upon the marketplace. But here, there is no allegation of an *Allen Bradley*-type conspiracy between unions and employers to use their collective bargaining agreement as a device to exclude others from the marketplace.

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[11] Amicus curiae AFL-CIO admits: "Congress has determined that in collective bargaining, unions have the right to take direct economic action against businesses despite the inevitable impact on product and service markets and *businesses have a countervailing right to take such action directly against unions and employees*." (AFL-CIO Br., p. 1.) [Emphasis supplied.] In its zeal to find a way around this admitted legal principle, the AFL-CIO argues that the statutory exemptions are not available to AGC and its members because "one group of employers may not conspire to eliminate competitors from the industry . . ." (AFL-CIO Br., p. 3, citing *United Mine Workers v. Pennington*, 381 U.S. 657, 665-666 (1965).) With all respect, the AFL-CIO appears not to have read the Complaint. Unlike *Pennington*, there is no allegation here that AGC conspired to drive any group of employers out of business; rather, the Complaint alleges that the *Union's* business was being damaged by AGC's encouragement of contractors not to enter into collective bargaining relationships with the Union (Par. XXIV(3)) and by AGC's encouragement and coercion of "letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs and each of them." And, of course, it need hardly be added that it is the *Union* that is bringing this action. As Judge Sneed noted, in dissent below, the conspicuous absence of any injured contractors from the list of plaintiffs in this case is some evidence of their "concern" about the economic impact of AGC's alleged acts. 648 F.2d at 542.

Respondent also quotes at length from Justice Frankfurter's opinion in *United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463 (1941) which details the legislative evolution of the statutory antitrust exemptions embodied in the Clayton and Norris-LaGuardia Acts. Because *Hutcheson* is a case which deals with a *union's* alleged anticompetitive activity, Justice Frankfurter's opinion understandably does not touch on the question of whether the statutory antitrust exemptions also apply to unilateral activity of employer groups. However, as Petitioner noted in its Opening Brief, that is the ineluctable conclusion to which the statutory language and the legislative history lead. (Pet. Br., pp. 37-39.)

Respondent attempts to distinguish away the holdings in cases such as *Amalgamated Meatcutters Local 876 v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979), *Kennedy v. Long Island Railroad*, 319 F.2d 366, 372 (2d Cir. 1963), *cert. denied*, 375 U.S. 830, 84 S.Ct. 75 (1963) and *Clune v. Publishers' Association*, 214 F. Supp. 520, 528 (S.D.N.Y. 1963), *aff'd. memo.*, 314 F.2d 343 (2d Cir. 1963) by stating that these cases "do not stand for such broadly sweeping antitrust immunity. Rather, these cases present instances of employers combining as part of the collective bargaining process in order to counter a union's 'whipsaw' strike or other pressure tactic." (Resp. Br., p. 15.) Respondents' attempt to distinguish the *Wetterau*, *Kennedy* and *Clune* cases is wholly unpersuasive. First, these cases announce no rule limiting the statutory exemption to activities which take place while a strike is in progress.[12] Second, this Court has recently reaffirmed its long-standing view that the term "labor dispute" is a broad one, which applies to union-employer disputes of all types, including those involving third parties; see *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*, ____ U.S. ____, 102 S.Ct. 2673 (1982).

Indeed, this Court's decision in *Jacksonville* is particularly pertinent to the present case. Even though the union's "dispute" was with a non-party, and even though the work stoppage was designed to pressure that non-party (the Soviet Union) to alter its foreign policy, this Court held that injunctive relief could not be granted under the Norris-LaGuardia Act. The *Jacksonville* decision appears to supply a complete answer to the contention of the Respondent and the Solicitor General that the statutory labor exemption should not apply in this case, because third parties (owners of land and others who award construction contracts) are objects of AGC's asserted anti-Union activity.

The supplemental order of the Ninth Circuit in this case admits that *some* multi-employer activities are within the statutory exemptions found in the Clayton and Norris-LaGuardia Acts. 648 F.2d at 544. However, the court suggests that multi-employer labor policies are not exempt when they have "either an anti-competitive purpose or a substantial anti-competitive effect." *Id*. The difficulty with this argument is that it exposes every anti-union labor policy adopted by a multiemployer bargaining unit to antitrust scrutiny, at the instance of the union, to determine whether it has any "anti-competitive effect." This is antithetical to the broad purpose of the Clayton and Norris-LaGuardia Acts, which exclude labor disputants, when following policies designed to further their labor purposes, from antitrust attack. This is particularly so where, as here, the party seeking to attack the multiemployer unit is not some economically affected third party, but the multiemployer bargaining unit's opposite number—the Union itself.[13]

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[12] Several circuit cases have assumed, without elaborate discussion, that the protective provisions of the Norris-LaGuardia Act apply to employers as well as unions. See *Detroit News v. Detroit Typo*, 471 F.2d 872, 876-77 (6th Cir. 1972); *Amalgamated Transit Union v. Greyhound Bus Lines*, 529 F.2d 1073, 1078 (9th Cir. 1976).

D. The Union Lacks Standing to Pursue Its Claim.

Amicus curiae AFL-CIO has cited this Court's recent decision in *Blue Shield of Virginia v. McCready*, ____ U.S. ____, 102 S.Ct. 2540 (1982) to support the proposition that the Union should be granted standing to pursue the purported antitrust claims set forth in the First Amended Complaint.

Petitioner believes that the reasoning of the *McCready* case lends no support to the Union's claim to standing. In *McCready*, the plaintiff had a direct, clearly ascertainable injury arising out of the refusal of Blue Shield to pay her medical bills for services performed by a psychologist. There was no difficulty in calculating McCready's damages, which consisted of the unreimbursed amount of her medical bills. Nor was there any serious danger of duplicative recovery.

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[13] The Ninth Circuit majority, while taking note of the right of employers to engage in multiemployer collective baraining, emphasizes that such a bargaining unit is a consensual relationship, to which the union must agree. 648 F.2d at 543. Because of the requirement that the union consent to bargain with the multiemployer unit, the Ninth Circuit concludes that activity designed to weaken or destroy the collective bargaining relationship with the union is antithetical to the purpose of the multiemployer unit. *Id.* We believe this reasoning is inapposite. The fact that the union must agree to the *formation* of the multiemployer bargaining unit does not imply that the union has some sort of veto power over the labor policies formulated by the employers participating in the unit. If this were so, then the only legal multiemployer bargaining unit would be one which would docilely pursue pro-union labor policies. Such a result would be in direct conflict with the recognized right of employers (and unions) to vigorously pursue their opposing economic goals in the collective bargaining context.

In the present case, as the Solicitor General has noted, the damages allegedly suffered by the Union are highly speculative. They would consist of (1) loss of revenue occasioned by (2) a drop in payment of Union dues occasioned by (3) the migration of Union workers into non-Union jobs thereby (4) causing such workers to drop out of the Union and cease paying dues. This is an extremely tenuous and questionable chain of causation. It is by no means clear that long-time Union members who go to work for open shop contractors will abandon their Union membership, particularly if they wish to remain eligible for future work with Union employers. Moreover, a decline in Union revenues as a result of Union members ceasing to pay dues will only occur (if at all) if non-Union employers hire significant numbers of Union craftsmen. It is far from clear that the majority, or even a significant number, of workers who are employed by open shop contractors are Union members.

The problem is compounded by the difficulty of determining what portion of the Union's alleged loss of revenue is occasioned by the conspiratorial acts of Petitioner, and what portion is occasioned by the general trend of owners and "other letters of construction contracts" to minimize costs by using non-Union labor.

The *McCready* case takes particular note of the fact that the antitrust laws were designed to provide consumers a remedy for restrictive trade practices. This Court held that "as a consumer of psychotherapy services entitled to financial benefits under the Blue Shield plan, we think it clear that McCready was 'within that area of the economy . . . endangered by [that] breakdown of competitive conditions' resulting from Blue Shield's selective refusal to reimburse." [Citation omitted.] 102 S.Ct. at 2549.

This holding is entirely consistent with the position taken by Petitioner in this case. First, the present case is *not* a consumer action brought by dissatisfied purchasers of carpentry labor and/or construction services. The Union cannot, in any realistic sense, be analogized to the consumer whose claim was presented in *McCready*.

Second, unlike the present case, *McCready* did not involve a potential conflict between federal labor law and federal antitrust law. There was no competing federal legal regime which might "get in the way" of analyzing McCready's claim under federal antitrust principles.

Finally, there was no tenable argument in *McCready* that the activities of which McCready complained were carried on outside the marketplace. Here, by contrast, the complained-of acts took place within the context of a tightly knit long-standing collective bargaining relationship.

Amicus curiae AFL-CIO argues that even if monetary damages may not appropriately be recovered by the Union, the Union would still have standing to obtain injunctive relief. (AFL-CIO Br., p. 3.) This interesting argument unfortunately overlooks the fact that neither the original Complaint nor the First Amended Complaint seeks any type of relief except an award of treble monetary damages.

In its brief, the Union relies heavily upon a law review article critical of traditional yardsticks utilized to determine who has standing to bring antitrust cases. *See* Berger and Bernstein, "An Analytical Framework For Antitrust Standing," 86 Yale L.J. 809 (1977). Berger and Bernstein argue that considerations of policy, rather than easily manipulated labels, provide the touchstone for determining which persons have standing to bring antitrust actions. The analysis offered by Berger and Bernstein, however, does not lead to the conclusion that the Union should have standing to press the present claim. Berger and Bernstein explicitly note the necessity to accommodate conflicting policies, reflected in other bodies of law, with the antitrust laws. Berger and Bernstein, *supra*, at 858, n. 227. If there were ever a case where the important considerations of public policy militate against the blind application of the antitrust laws, surely this is it. There can be no serious question that uncritical application of antitrust analysis in the present situation will do serious damage to the uniform application of federal labor policy. *See* Handler and Zifchak, "Collective Bargaining and the Antitrust Laws," 81 Col. L. Rev. 459, 460 (1981).

III.
CONCLUSION.

The decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,
Petitioner,
v.

CALIFORNIA STATE COUNCIL OF CARPENTERS AND
CARPENTERS 46 NORTHERN COUNTIES CONFERENCE BOARD,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations, a federation of 101 national and international unions with a total membership of 14,500,000 working men and women, files this brief *amicus curiae* in support of the position of the respondents, with the consent of the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decisions from *Allen Bradley Co.* v. *Union*, 325 U.S. 797 to the present leave no room for the contention that the labor exemption to the antitrust laws protects direct product and service market restraints by a business group whose justification is a hoped-for trickle down effect—positive or negative—on union strength or on labor standards. Where that is the claim, there is no occasion to "reconcile * * * two declared congressional poliices [—] to preserve a competitive business economy [and] to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining". (*Id.* at 809.) The complaint here alleges such a restraint and petitioner offers no other justification. Thus despite the unhappy history of the misuse of the antitrust laws in cases involving labor relations, we, like the court below, cannot escape the conclusion that the complaint states a cause of action.

But our presentation would be incomplete if we did not begin by stressing a related point not properly at issue here: Congress has determined that in collective bargaining, unions have the right to take direct economic action against businesses despite the inevitable impact on product and service markets and businesses have a countervailing right to take such action directly against unions and employees. And, Congress has also determined that in the interests of more perfect industrial peace, unions and businesses are given wide latitude through agreement to pretermit or to end such economic warfare. The legality of agreements between businesses and between businesses and unions in these contexts, as contrasted to the legality of the agreement between businesses at issue here, does turn on a reconciliation of the antitrust laws and the labor laws.

It is our submission: (a) that § 1 of the Sherman Act prohibits alike agreements between business entities whose employees are not represented by a union ("non-union businesses"), acting on their own and without union involvement, not to deal with business entities whose employees have chosen union representation ("union businesses") and agreements between union businesses, acting on their own, not to deal with non-union businesses; and (b) that nothing in § 20 of the Clayton Act, in §§ 4 & 13 of the Norris-LaGuardia Act or in the National Labor Relations Act, as amended, protects such concerted refusals to deal.

Agreements between non-union businesses *inter se* or between union businesses *inter se* seeking to drive their opposite numbers from a market are not mentioned in § 20 of the Clayton Act or in §§ 4 & 13 of the Norris-LaGuardia Act; nor does either Act's legislative history speak of an intent to protect such agreement. Likewise the NLRA does not permit union businesses or nonunion businesses to join together to eliminate or disadvantage their competitors.

We show in point I of our argument that the complaint states a cause of action under the Sherman Act that is not negated by any of the labor exemptions. The complaint alleges, *inter alia*, an agreement between one group of contractors not to deal with another group of contractors. This is a classic concerted refusal to deal violative of § 1. (See, in particular, *Fashion Organizers' Guild* v. *FTC*, 312 U.S. 457) and *Connell Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616 ("*Connell*").

It is clear, too, from this Court's precedents that an agreement among businesses acting alone to engage in a concerted refusal to deal is not protected by the "statutory exemption" (*Connell*, 421 U.S. at 622). In *Allen Bradley*, the Court held that an agreement among businesses to allocate markets is not exempt from the antitrust laws even though the union participated therein. Petitioner's argument that *Allen Bradley* is distinguishable because here the businesses were acting "unilaterally" in the special sense that no union was a party to their agreement, turns the reasoning of *Allen Bradley* on its head. And *Mine Workers* v. *Pennington*, 381 U.S. 657, 665-666, makes it clear that notwithstanding the labor exemption "*One group of employers may not conspire to eliminate competitors from the industry* and the union is liable with the employers if it becomes a party to the conspiracy." (Emphasis added.)

Moreover, there is nothing in "[t]he Congressional policy favoring collective bargaining under the NLRA," (the "nonstatutory exemption," *Connell*, 421 U.S. at 622) which contemplates, much less privileges, agreements between businesses acting alone such as that here that would otherwise be deemed restraints of trade. This case does not involve "the use of the classic weapons of industrial relations" (Pet. Br. (37), since the defendant general contractors have no interest recognized by either the antitrust laws or labor laws in whether their subcontractors do or do not have a collective bargaining agreement with the union.

In point II we address petitioners' contention that the plaintiffs' complaint should be dismissed for want of standing. We there show that plaintiffs plainly have standing to obtain an injunction pursuant to § 16 of the Clayton Act. (See *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 130-131.) Therefore, the complaint may not be dismissed even if, as petitioner contends, § 4 does not authorize the union to sue to recover treble damages. (See Rule 54(c) of the Federal Rules of Civil Procedure.)

ARGUMENT

I. THE COMPLAINT STATES A CAUSE OF ACTION UNDER THE SHERMAN ACT THAT IS NOT NEGATED BY EITHER THE "STATUTORY" OR "NONSTATUTORY" LABOR EXEMPTIONS.

A. Petitioner—like the district court and the dissenting judge below—would view the complaint in this case as through a glass, darkly. The court below, however, read the complaint "in the revealing light of *Conley* v. *Gibson*, 355 U.S. 41" (*Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 408). And it is the court below that properly followed this Court's instructions as recently affirmed in *McLain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232, 246:

> It is axiomatic that a complaint should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); see 5 C. Wright & A. Miller, Federal Practice and Procedure §§ 1202, 1205-1207, 1215-1224, 1228 (1969). This rule applies with no less force to a Sherman Act claim * * *.

See also, *e.g.*, *U.S.* v. *Employing Plasterers Assn.*, 347 U.S. 186, 189; *Radovich* v. *National Football League*, 352 U.S. 445, 453; *Hospital Bldg. Co.* v. *Rex Hospital Trustees*, 425 U.S. 738, 746.[1]

Under this standard, there can be no doubt that the court below was entirely correct in its summary of "[w]hat the Unions' first amended complaint does allege," *viz.* that

> the AGCC conspired to coerce "owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories

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[1] The district court's narrower reading of the complaint (404 F.Supp. at 1070), with which the dissent below agreed (648 F.2d at 541), followed the hypertechnical approach discredited in the cited precedents.

> to collective bargaining agreements with plaintiffs." The Unions also allege that members of the AGCC coerced and aided each other to subcontract only with subcontractors who had not signed with the Unions. [648 F.2d at 531, quoting the first amended complaint. The footnote citation to that complaint is omitted.][2]

As that court added: "The situation described by these allegations is very similar to a concerted refusal to deal, or a group boycott, which have both been held to constitute Sherman Act violations." (*Id.*) Specifically, the complaint alleges a conspiracy to drive contractors and subcontractors who have signed collective bargaining agreements with the union from the construction market. Whatever argument may be advanced that such a conspiracy finds protection in the various labor exemptions to the antitrust laws derived from the special statutory relationship between those laws and the labor laws (a point discussed at pp. 10 to 20, *infra*), the allegations just described assert a classic agreement in restraint of trade forbidden by § 1 of the Sherman Act. The trade restrained is that between the parties that let construction contracts and defendant general contractors on the one side and the disfavored general contractors and subcontractors on the other.[3]

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[2] The Court of Appeals confined its discussion to the question of whether the quoted portion of the complaint states a valid cause of action and answered that question in the affirmative. As we show herein that answer is correct beyond doubt. The complaint also alleges a conspiracy to eliminate the plaintiff union itself from the market for providing representational services to employees; this raises a more delicate question concerning the anti-trust and labor laws—one never addressed by this Court. We suggest that because this case is at the pleading stage and because the court of appeals did not consider this matter it would be premature for this Court to address this latter aspect of the complaint and we urge the Court not to do so.

[3] *Amicus curiae* Chamber of Commerce seeks to avoid the complaint's critical allegations by reinterpreting those allegations. The

The decisions cited by the Court of Appeals (*id.* at 531, n.5) are directly in point and provide ample precedent for the sufficiency of the § 1 allegations herein. And inescapable also, as was demonstrated below (*id.* at 531-532), is the parallel between the allegations in this complaint and the allegations held to state a valid Sherman Act cause of action in *Connell Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616. The precise antitrust violation alleged in *Connell* was an agreement between the union and general contractors, reached outside the context of a collective-bargaining relationship, that the general contractors would not subcontract to contractors

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Chamber concedes, as it must, that subparagraphs 3, 4, and 5 of paragraph XXIV

> do allege activities by Defendants designed to influence members and nonmembers to "refuse to enter into collective bargaining relationships with Plaintiffs," "to hire contractors and subcontractors who are not signatories to collective bargaining agreements with Plaintiffs," and "to enter into subcontracting agreements with subcontractors who are not signatories to any collective bargaining agreement with Plaintiffs." [COC Br. 8-9.]

The Chamber urges, however, that

> when taken in context and read in light of the preceding Paragraphs and the accompanying Subparagraphs (2) and (6), it is crystal clear that the complaint alleges that Defendants engaged in such activity in furtherance of *doubled-faced operations*, not *exclusively non-union operations*. [COC Br. 9, emphasis in original.]

Pages 7-8 of its brief also argue elaborately how the Chamber would like the complaint to be read. But this approach, though imaginative, does not state the only or even the natural way of reading the complaint which is not limited to claims concerning the establishment of double-breasted operations (*viz.*, commonly-owned businesses, some operating union, others nonunion). Thus, the Chamber's gloss on the complaint cannot be reconciled with this Court's teachings in *Conley*, *Radovich* and the other precedents cited at p. 4, *supra*.

tht did not have collective bargaining agreements with the union. (*Id.* at 623-625.)[4] The Court concluded its discussion rejecting the union's labor exemption defense by stating:

> Here Local 100, by agreement with several contractors, made nonunion subcontractors ineligible to compete for a portion of the available work. This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws. * * * In this case, Local 100 had no interest in representing Connell's employees. The federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market. [*Connell,* 421 U.S. at 625-626.]

The Court of Appeals' conclusion herein is therefore inescapable:

> The Unions' allegations, contained in the first amended complaint, present virtually the obverse of the situation described in *Connell.* The AGCC allegedly sought to coerce owners of property, general contractors, and "other letters of construction contracts," with whom the Unions had no collective bargaining relationship, to hire only construction firms, primarily subcontractors, who had not signed with the Unions. Such conduct could well restrain

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[4] One brief *amicus curiae* remarkably relies on *Connell* for the proposition that the complaint is beyond the ambit of the Sherman Act. The brief accurately cites *Connell* for the proposition "that the antitrust laws [are] applicable 'when a union and a non-labor party agree to restrain competition in a *business* market.' " (AGCA Br. at 10, quoting 421 U.S. at 622-623, AGCA's emphasis); but that brief then overlooks the fact that the complaint here alleges restraint in the same "business" market as was involved in *Connell.*

> competition since success in getting others to adhere to the conspiracy would effectively lock union-signatory subcontractors out of a portion of the market for carpentry work. More efficient subcontractors who had signed with the Unions and were paying wage rates and fringe benefits equal to or lower than those paid by nonunion subcontractors would be precluded from competing for carpentry work required by those who had not signed with the Unions. Thus, the rationale underlying *Connell* would seem to apply with at least equal force to this case. Absent a valid exemption from the antitrust laws, the employers' group here, like the union in *Connell*, may be found to have violated the Sherman Act. [648 F.2d at 532]

Petitioner in responding to this reasoning entirely disregards the leading group boycott cases in this Court, including those cited by the court below. Rather, aside from the familiar quotation from *Standard Oil Co.* v. *United States*, 221 U.S. 1, 63, at Pet. Br. 12 (which is, of course, unexceptionable, but merely poses the issue of legality in § 1 cases), petitioner's argument on the Sherman Act issue rests on only one decision in this Court, *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469. (Pet. Br. 12-15.) That petitioner's reliance on *Apex* is misplaced appears from the very first paragraph of its quotation from that opinion:

> "The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before enactment of the Sherman law. They were contracts for the restriction or suppression of competition *in the market*, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, *which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market* . . . ." [310 U.S. at 497, quoted with emphasis at Pet. Br. 13.]

The complaint plainly alleges that the defendants have entered into "contracts for the restriction or suppression of competition *in the market.*" Thus, again tracking petitioner's quotation of *Apex*, the complaint alleges "*some form of restraint upon commercial competition in the marketing of goods or services.*" (310 U.S. at 495, quoted with emphasis at Pet. Br. 14.)

Petitioner relies also on *Prepmore Apparel, Inc.* v. *Amalgamated Clothing Workers*, 431 F.2d 1004 (C.A. 5), cert. granted 401 U.S. 993, dismissed by stipulation 404 U.S. 801, as supporting its reading of *Apex* (Pet. Br. 16-17). But that case, which antedated *Connell*, concerned a complaint alleging a direct effort to injure or destroy the plaintiff union, not an effort to injure or destroy firms with which the union had collective bargaining agreements. In *Prepmore* the Fifth Circuit said, "There is no indication, however remote, of a conspiracy or combination on the part of Prepmore and Blue Bell to restrain competition in the marketing of Prepmore's goods." (431 F.2d at 1007.) Thus, that court did not so much as consider whether a Sherman Act violation would be stated by an allegation parallel to that here of a conspiracy by nonunion business to drive businesses with collective bargaining agreements out of the clothing industry. Indeed, petitioner's description of *Prepmore* and *Apex* is tantamount to a concession that (the labor exemption issue aside) the complaint herein alleges a violation of the Sherman Act:

> The *Prepmore* decision is significant because it emphasizes, as does *Apex*, a critical limitation on the application of the Sherman Act. Only those disputes which have some significant, direct impact on competition in the sale of goods or services come within the purview of the Sherman Act.
>
> In cases such as this one, where the gravamen of the Complaint is not an active market restraint but, rather, a labor grievance, the courts have consistently refused to find a violation of the Sherman Act. [Pet. Br. 17]

The error is that petitioner misreads this complaint, which, unlike that in *Prepmore*, does allege "an active market restraint."

B. The provisions cited by petitioner—§ 20 of the Clayton Act, §§ 4 & 13 of the Norris-LaGuardia Act and the NLRA as amended—do not permit businesses acting on their own to combine or conspire to engage in a concerted refusal to deal otherwise unlawful under § 1 of the Sherman Act.

The first paragraph of § 20 states a rule of pleading and proof in cases growing out of labor disputes concerning the need to show "irreparable injury to property" for which there is "no adequate remedy at law" as a condition of securing injunctive relief and thus does not make unlawful that which would otherwise be lawful.

In contrast, the second paragraph of § 20 does make lawful the actions during labor disputes specified therein. And, of course, §§ 4 & 13 of the Norris-LaGuardia Act parallel, and by broadening the scope of the term "labor dispute" expand, the permissions stated in § 20 of the Clayton Act. But as the Court of Appeals said:

> The Supreme Court * * * has refused to apply Section 20 to exempt anticompetitive conduct involving employer groups, even though the conduct, which also involved labor unions, might have been said to arise out of a "labor dispute" as defined in the Norris-LaGuardia Act. [648 F.2d at 534.]

That statement was premised on *Allen Bradley Co.* v. *Union*, 325 U.S. 797, 809, where this Court held:

> [W]hen the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.

Even as "*Allen Bradley* involved a combination of unions and employers in a broad conspiracy to fix prices and allocate markets in the New York City area" (Pet. Br. 34) so this case involves a combination of employers to "allocate markets" in California. Petitioner responds, "Nothing in the *Allen Bradley* opinion supports the Ninth Circuit's belief that the exemption provided by Section 20 is unavailable to employer groups acting unilaterally in formulating and carrying out labor relations policies, and encouraging others to follow the same policies." (Pet. Br. 34.) We submit, to the contrary, that the very point of *Allen Bradley* is that notwithstanding the "statutory exemption," "market allocation" by businesses is not exempt from the antitrust laws even if it is done "unilaterally" by those businesses as an aspect of "formulating and carrying out labor relations policies, and encouraging others to follow the same policies" (Pet. Br. 34).

Petitioner's use of the words "unilateral" and "unilaterally" (Pet. Br. 34) is a virtual parody of the law declared by this Court concerning the "statutory exemption" from the antitrust laws. *United States* v. *Hutcheson*, 312 U.S. 219, 232, read §§ 6 & 20 of the Clayton Act and §§ 4 & 13 of the Norris-LaGuardia Act as declaring that a union is exempt from the antitrust laws so long as the union "acts in its self-interest and does not combine with non-labor groups." This was reaffirmed in *Allen Bradley*, 325 U.S. at 810-811. But as was there held, a union does lose that exemption by "combining" with a nonlabor group. (*Id.*)

In support of that holding the *Allen Bradley* Court noted that the "primary objective of all the Anti-trust legislation has been to preserve competition and to proscribe business monopoly" and that "if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture by Congress to prohibit price fixing by business groups themselves." (*Id.* at 809-810.) And, the Court drew the lesson that

> Congress evidently concluded * * * that the chief objective of Anti-trust legislation, preservation of business competition, could be accomplished by applying the legislation primarily only to those business groups which are directly interested in destroying competition. [*Id.* at 811.]

That conclusion, said the Court, reflects "Congress['] fear[] [of] the *concentrated power of business organizations* to dominate markets and prices." (*Id.*, emphasis added.)

Thus, *Allen Bradley's* result is based on the understanding that the anti-trust laws are aimed at business groups and apply to unions only insofar as unions combine with business groups; it is not based on any notion that the anti-trust laws regard a combination composed of businesses and unions as more pernicious than a combination of businesses alone. The rule of that case reflects "an inherent tension between national antitrust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment." (*H.A. Artists & Associates, Inc.* v. *Actors' Equity Assn.*, 451 U.S. 704, 713.) Such cases as *Allen Bradley*, *Mine Workers* v. *Pennington*, 381 U.S. 657 ("*Pennington*"), *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 ("*Jewel Tea*") and *Connell*, to name only the most important, presented the need to resolve that tension. This case does not. An agreement among business entities—whether the businesses are union or non-union—that is"unilateral" in the special sense that unions are not parties thereto, and that restrains competition in a product or service market, violates the antitrust laws and is unredeemed by any aspect of the national labor policy.

The only opinion in this Court which petitioner cites as affirmative support for its interpretation of the labor exemption is Justice Goldberg's separate opinion in *Pennington* and *Jewel Tea*. But the language quoted therefrom at Pet. Br. 34 deals with *union-business* agreements and therefore would provide petitioner with no support for its proposed distinction of *Allen Bradley* even if that opinion had commended itself to a majority of the Court.[5] And, the opinion of the Court in *Pennington* is strong authority against petitioner's quest for exemption:

> *One group of employers may not conspire to eliminate competitors from the industry* and the union is liable with the employers if it becomes a party to the conspiracy. [381 U.S. at 665-666, emphasis added.]

It is implicit in the foregoing that the same result obtains if union businesses acting alone agree to eliminate—by concerted refusals to deal or other similar means—non-union businesses. In such an instance it is equally true that national labor policy provides no support for such an agreement and that antitrust policy is clearly set against the agreement. And, since nothing in the labor laws or antitrust laws grants non-union businesses acting alone a greater right to eliminate union businesses, the same reasoning applies to a conspiracy to concertedly refuse to deal with union business such as that alleged in paragraphs XXIV (3)-(6) of the complaint in this case.

In *Pennington*, the Court also recognized it to be

> beyond question that a union may conclude a wage agreement with [a] multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers. [381 U.S. at 664.]

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[5] The nub of the problem in *Pennington* and *Jewel Tea* was the extent to which the Congressional policy which permits employers to bargain with unions on a multiemployer rather than individual basis exempts from the antitrust laws collective bargaining agreements arrived at in multiemployer bargaining.

Such agreements are lawful because

> wages lie at the very heart of those subjects about which employers and unions must bargain and the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit. *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87, 94-96. The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503-504. [381 U.S. at 664.]

Just as the union's "legitimate aim * * * is to obtain uniformity of labor standards and * * * a consequence of such union activity may be to eliminate competition based on differences in such standards [,] *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503" (*Pennington*, 381 U.S. at 666), the businesses with whom the union has a collective bargaining agreement have an economic interest in avoiding competition from other employers who either do not have such agreements or who have negotiated such agreements calling for lower labor standards. Nevertheless, the *Pennington* Court held that an agreement between the union and union businesses that the union would impose the same standards on all competitors is not exempt from the anti-trust laws. (381 U.S. at 665-669.) Nor, by parity of reasoning would an agreement among union businesses not to deal with non-union businesses—and thereby to pressure the latter to eliminate their competitive advantage based on lower labor standards—come within the labor exemption. An agreement by non-union businesses not to deal with union businesses lacks both that economic justification and any basis for a claim for protection under the "nonstatutory" exemption. Indeed the defendant general contractors do not even have a comparable economic interest in the labor conditions of subcontractors, who are not their competitors.

As the foregoing discussion indicates, the Court of Appeals properly gave short shrift to petitioner's reliance on the "nonstatutory" exemption to the antitrust laws derived from "the congressional policy favoring collective bargaining under the NLRA" (*Connell*, 421 U.S. at 622). Aside from its recognition of the right of union businesses to select their bargaining agents (see § 8(b)(1)(B)) and their right to join together in multiemployer bargaining (see *Charles D. Bonanno Linen Service* v. *NLRB*, —— U.S. ——, 50 L.W. 4087, 4089 (Jan. 12, 1982)), we are unaware of any in which the NLRA, as amended, contemplates, much less privileges, agreements between businesses acting alone that would otherwise be deemed restraints of trade. The NLRA, as originally passed, and as since refined, proceeds from the premise stated in § 1 thereof that there is an "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association" which is to be cured by protection by law "of the right of employees to organize and bargain collectively" and the "elimination of * * * certain practices by some labor organizations, their officers and members." Aside from those noted above, there is not the least indication of a Congressional intent to grant businesses acting alone—either union or non-union—any right to combine heretofore denied by the antitrust laws.

To shore up its statutory arguments petitioner concludes, "employers, like anyone else, have First Amendment right of free speech and association, which permit them to advocate 'open shop' construction, use of non-union labor, and other policies inimical to organized labor." (Pet. Br. 28). We certainly agree that the First Amendment permits employers to so *advocate*, but the allegations of the complaint go far beyond advocacy. And, as this Court recently reaffirmed in a Sherman Act case, "The First Amendment does not 'make it * * * impossible ever to enforce laws against agreements in restraint of trade . . . .'" (*National Soc. of Professional Engineers* v. *U.S.*, 435 U.S. 679, 697, quoting *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 502.)[6]

C. Petitioner bases its argument that the court below erred in holding that the "statutory" labor exemption does not protect the activities alleged in the complaint on the supposition that the Court of Appeals determined that the exemption protects only labor organizations. (Pet. Br. 32-39.) But the Court of Appeals made no such ruling; indeed its discussion of § 20 of the Clayton Act (648 F.2d at 533-536) assumes that the exemption would be available to employers in an appropriate case, but concludes that this is not such a case.

We hasten to add that we agree that the "statutory" and "nonstatutory" labor exemptions do apply to businesses as well as unions. Businesses have a right to to resist adoption of the terms and conditions of employment sought by unions on behalf of employees and the lockout is no more subject to anti-trust regulation than the strike. "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." (*Labor Board v. Insurance Agents*, 361 U.S. 477, 489.) And the NLRA, as amended, determines the economic weapons available to each side, affirmatively protecting some under § 7, forbidding others under § 8 and leaving yet others entirely unregulated. See, *e.g.*, *Insurance Agents*, 361 U.S. at 488-500; *Teamsters Union v. Morton*, 377 U.S. 252, 258-260; *Machinists v. Wisconsin Emp. Rel. Com'n.*, 427 U.S. 132, 142-155. In this respect, at least, the NLRA entirely occupies the field. In *Machinists*, the Court squarely held that the states were without power to forbid an economic weapon which, though not covered by either § 7 or § 8 was left unregulated by some then federal law: "The availability or not of economic weapons that federal [labor] law leaves the parties free to use cannot 'depend upon the forum in which the [opponent] presses its claims.'" (*Machinists*, 427 U.S. at 153, quoting *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 256). Neither the National Labor Relations Board, nor the state courts, nor the federal courts under the antitrust laws or otherwise may function as "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." (*Insurance Agents*, 361 U.S. at 497.)

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[6] Decisions subsequent to *Giboney* have gone beyond the above-quoted holding and have, we believe, given the First Amendment an unnecessarily restrictive reading. But even if all such decisions were overruled, the complaint here would still stand, since even under what we believe to be the proper view that Amendment absolutely protects *communications* advocating lawful refusals to deal but does not extend to *agreements* to participate in a boycott.

Of course, *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (Pet. Br. 29) is far from the mark, since the complaint does not allege the illegal resort to any governmental body.

The decisions on which petitioner and its supporting *amici curiae* rely to bring this case within the statutory labor exemption, *Amalgamated Meat Cutters*, *Kennedy* and *Clune*,[7] involved adverse action by businesses against unions and employees in the course of collective bargaining negotiations. We agree that these cases are correctly decided.[8] Whatever effects the antitrust laws may otherwise have on labor relations, those laws are in our view excluded absolutely from regulating coercive measures directed by businesses against unions or by unions against businesses in bargaining over the terms of a collective bargaining agreement.[9]

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[7] *Amalgamated Meat Cutters, Local 576* v. *Wetterau Foods, Inc.*, 597 F.2d 133, 136 (C.A. 8); *Kennedy* v. *Long Island Railroad*, 319 F.2d 366 (C.A. 2), *cert. denied*, 373 U.S. 830; *Clune* v. *Publishers' Association*, 214 F.Supp. 520, 528 (S.D. N.Y.), *aff'd mem.*, 314 F.2d 343 C.A. 2).

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[8] We also agree with the language petitioner quotes from *United States* v. *San Francisco Electrical Contractors Ass'n.*, 57 F. Supp. 57, 62-63 (N.D. Cal.). The actual decision in that case, on which petitioner does not appear to rely, rests on a restricted view of the impact on interstate commerce that must be shown to establish a violation of the Sherman Act (*id.* at 64-68); that view has been discredited by later cases, see *Las Vegas Merchant Plumbers Ass'n.* v. *United States*, 510 F.2d 732, 742 (C.A. 9), disapproving *San Francisco Electrical Contractors* in light of *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219.

[9] The distinction is expressly recognized in *Plumbers & Steamfitters Local 598* v. *Morris*, 511 F. Supp. 1298 (E.D. Wash.) (*Morris*) cited at AGCA Br. 9 and 11, PMA Br. 13, 19 and COC Br. 14-15 but understandably not by petitioner. That case also rests on the principle that the "lawfulness of conduct in the traditional economic struggle between labor and management is generally measured under the standards of labor law and not antitrust law." (511 F. Supp. at 1304.) Judge Quackenbush refused to

> condemn the practice of joining together to lockout as posing an incipient threat to competition. Such a holding would blur the distinction between guilty and innocent commercial behavior. [*Id.* at 1310.]

Accordingly, he declared that the Ninth Circuit decision under review herein

> presented a critically different case than the case brought by the complaint in this court [*Morris*]. The panel in California State Council [of Carpenters] characterized the alleged restraint as a coercive refusal to deal which affected "commercial competition in the 'marketing of goods or services' in that its effect would be to preclude union-signatory subcontractors from a portion of the market for carpentry work. Plaintiff in this case neither alleged nor evidenced restraint upon commercial competition—a pre-requisite to the application of the Sherman Act [648 F.2d] at 531 (citations omitted). [*Id.* at 1312]

But this principle and the authorities relied on at Pet. Br. 33 have nothing to do with the present case. For this case does not involve "the use of the classic economic weapons of industrial relations" (Pet. Br. 37). The defendant general contractors have no interest recognized by either the antitrust laws or the labor laws in whether their subcontractors have or do not have a collective bargaining agreement with the union. For, unless the general contractors have entered into a collective bargaining agreements containing a clause, authorized by the construction industry proviso to § 8(e), to contract only with union subcontractors, the general contractors are free to subcontract to the lowest bidder, union or non-union. And general contractors are entitled to protect themselves from entering into § 8(e) proviso clauses by refusing to agree to the union's demand and if necessary by using such economic weapons as the lockout.[10] But antitrust policy forbids the general contractor from circumventing § 8(e) proviso agreements once entered into, or from avoiding such agreements, by concertedly eliminating or agreeing not to deal with union subcontractors. See pp. 13-15, *supra*.

As an additional ground of decision, the court below did rely on the pro-labor purposes of the Norris-LaGuardia Act and § 20 of the Clayton Act:

> Before the passage of those acts, employers frequently sought injunctions to frustrate labor unions' organizational drives. That the limitations on the federal injunctive power embodied in these acts were designed primarily to promote the organization of

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[10] We note that in *Woelke & Romero Framing Co.* v. *NLRB*, —— U.S. ——, No. 80-1798 (May 24, 1982) the Court expressly left open the question whether unions may utilize economic weapons to obtain a § 8(e) subcontracting clause Slip Op. at 20-21. We here assume, because we believe it is correct, that they may. See Brief for Respondent Unions *id.* pp. 37-40. Of course, if unions may not do so, then the general contractors could simply refuse to agree to such subcontracting clauses.

> labor unions is well illustrated by the policy statement found in section 2 of the Norris-LaGuardia Act:
>
> * * *
>
> Thus the statutory exemption may not be construed to exempt a conspiracy of employers to destroy a particular union through a boycott of union-signatory subcontractors because such conduct is completely antagonistic to the pro-labor purposes for which the acts containing the labor exemption were enacted. [648 F.2d at 535-536 (quotation from § 2 omitted).]

Petitioner and its supporting *amici curiae* criticize this reasoning, but it is entirely correct. To allow employers to defend a conspiracy which would otherwise be forbidden by the antitrust laws on the ground that it was motivated by an antiunion purpose "would indeed be to 'turn the blade inward'" (Jackson, J., in *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232, 237, rejecting an earlier claim that those "whose rights are preserved by the Norris-LaGuardia Act" are deprived by the Act of the ability to enforce their rights.) When unions are acting alone, they are exercising rights vouchsafed by the Clayton and Norris-LaGuardia Acts pursuant to Congress' judgment that the right of working people to organize and to exercise economic weapons in support of their demands for better working conditions is not to be restricted by the antitrust laws. But when businesses act alone to impose restraints on product and service markets, then whatever their motive, there is nothing in the Clayton and Norris-LaGuardia Acts which would be offended by giving the policies of the antitrust laws full sway.

II. PETITIONER'S "STANDING" OBJECTION TO THE COMPLAINT IS WITHOUT MERIT.

A. Petitioner contends, contrary to the court below, that the plaintiffs lack standing to assert a claim for damages under § 4 of the Clayton Act. The merits of that issue need not be reached, however, because, as we show in the next subsection, the complaint states a claim for injunctive relief under § 16 of that Act. And even assuming that the limitations which petitioner finds in § 4 do not restrict the scope of that provision, they simply do not pertain to § 16.

Accordingly, if we are also correct that the allegations of the complaint are sufficient on the antitrust merits (point I, *supra*) the facts on which the validity of the damage claim will rest are best developed at trial, thereby avoiding an essentially abstract ruling under § 4.

Since the Court may, nevertheless, choose to reach the § 4 issue, we would address it in this brief but for the pendency of *Blue Shield, Inc. of Virginia* v. *McCready*, No. 81-225, argued March 24, 1982. As briefed and argued by the parties, the *Blue Shield* case has many points in common with the present and the decision therein, even if it is not dispositive, is likely to clarify the analysis of the § 4 issue.[11] We therefore believe that it would be premature to brief the § 4 issue now, and shall instead move for leave to file a short supplemental memorandum discussing the § 4 issue in the light of the decision in *Blue Shield* promptly on that decision issuing.[12]

B. The complaint, while not in so many words seeking injunctive relief, requests "such other and further relief as to this Court seems just and proper." (Pet. App. E., p. 30). Moreover, even if this general prayer had been omitted, or if it were read (contrary to the spirit of the

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[11] As stated by petitioner Blue Shield, the § 4 question there is:

> Whether a subscriber to a prepaid health care plan, purchased by her employer in an unrestrained insurance market, has standing under § 4 of the Clayton Act to complain that the plan is boycotting clinical psychologists' by failing to cover their services. [Brief for Petitioner, No. 81-225, p. i]

[12] For this reason the present brief is only 25 pages in length and any supplemental brief which we tender will be no more than 5 pages.

Federal Rules) as not encompassing a prayer for injunctive relief, the complaint would not be subject to dismissal because of the omission. What the Court said about a constitutional claim in *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, applies fully to plaintiff's Sherman Act claim here:

> We agree with appellants that a federal court should not dismiss a meritorious constitutional claim because the complaints seeks one remedy rather than another plainly appropriate one. Under the Federal Rules of Civil Procedure "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Rule 54(c). Thus, although the prayer for relief may be looked to for illumination when there is doubt as to the substantive theory under which a plaintiff is proceeding, its omissions are not in and of themselves a barrier to redress of a meritorious claim. See, e.g., 6 J. Moore, W. Taggart, & J. Wicker, Moore's Federal Practice ¶ 54.62, pp. 1261-1265 (2d ed. 1976). But while a meritorious claim will not be rejected for want of a prayer for appropriate relief, a claim lacking substantive merit obviously should be rejected. [439 U.S. at 65-66.][13]

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[13] See also 10 Wright & Miller, *Federal Practice and Procedure*, §§ 2662 and 2664. As this treatise succintly puts it:

> Inasmuch as the demand for relief does not constitute part of the pleader's claim for relief, a failure to demand the appropriate relief will not result in a dismissal. The question is not whether plaintiff has asked for the proper remedy but whether he is entitled to any remedy. Of course, the court cannot provide a remedy, even if one is demanded, when plaintiff has failed to set out a claim for relief. Similarly, it is not the amount claimed or the type of relief requested in the demand that determines whether the court has jurisdiction; as a result, Rule 54(c) has been invoked by courts as authority for awarding appropriate relief when they had not jurisdiction to grant the relief actually demanded by plaintiff. [*Id.* at pp. 108-110, footnotes omitted.]

Section 16 of the Clayton Act provides in pertinent part as follows:

> Any person firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . .

The plaintiffs are "association[s]," and their complaint plainly sets forth "threatened loss or damage by [the] violation[s] of the antitrust law" alleged therein.

The decisions of this Court interpreting § 16 leave no room for an argument that this provision is to be construed more narrowly than its terms provide. In *Zenith Corp. v. Hazeltine*, 395 U.S. 100, this Court unanimously held:[14]

> The evident premise for striking Paragraph C was that Zenith's failure to prove the fact of injury barred injunctive relief as well as treble damages. This was unsound, for § 16 of the Clayton Act, 15 U.S.C. § 26, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened" injury.[34] That remedy is characteristically available even though the plaintiff has not yet suffered actual injury, see *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.*, 274 U.S. 37, 54-55 (1927); he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary

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[14] While Justice Harlan wrote separately, he concurred in the portion of the opinion which discussed § 16. (See 395 U.S. at 141.)

> violation likely to continue or recur. See *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905); *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn., supra*, at 54; *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952); *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953).
>
> Moreover, the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. *E.g.*, *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954). Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944). Its availability should be "conditioned by the necessities of the public interest which Congress has sought to protect." *Id.*, at 330. [395 U.S. at 130-131]

Later, in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 260-262, the Court distinguished § 16 injunction suits from § 4 damage suits, which may be brought only by a "person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws * * *." The thrust of the Court's discussion was that § 16 is broader than § 4 in that "Congress included the 'business or property' requirement in § 4 but not in § 16." (*Id.* at 261.)[15] Although the legislative history of the Sherman and Clayton Acts was deemed to be "not very instructive" as to the reason for this distinction, the "most likely explanation" was deemed to lie in "the essential differences between the" injunctive and damage remedies (*Id.*)

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[15] Of course, if the court below is correct in concluding that the plaintiffs are entitled to sue under § 4, it follows *a fortiori* that they are also entitled to sue under § 16.

> While the United States Government, the governments of each State, and any individual threatened with injury by an antitrust violation may all sue for injunctive relief against violations of the antitrust laws, and while they may theoretically do so simultaneously against the same persons for the same violations, the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one.
>
> * * *
>
> The position of a defendant faced with numerous claims for damages is much different. If the defendant is sued by 100 different persons or by one person with 100 separate but cumulative claims, and each claim is for damages, the potential liability is obviously far greater than if only one of those persons sued on only one claim. Thus, there is a striking contrast between the potential impact of suits for injunctive relief and suits for damages. [*Id.* at 261-262]

The complaint in this case is more than sufficient to allege real and threatened injury to the plaintiff unions.

CONCLUSION

For the reasons stated above the decision below should be affirmed.

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Supplemental Amicus Brief

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No. 81-334

IN THE

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OCTOBER TERM, 1981

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,
Petitioner,
v.

CALIFORNIA STATE COUNCIL OF CARPENTERS and
CARPENTERS 46 NORTHERN COUNTIES CONFERENCE BOARD,
Respondents.

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL MEMORANDUM AMICUS CURIAE AND SUPPLEMENTAL MEMORANDUM FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A SUPPLEMENT TO ITS BRIEF AMICUS CURIAE IN ORDER TO DISCUSS A RECENT DECISION BY THIS COURT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court for leave to file the accompanying supplemental memorandum *amicus curiae.* In support of this motion the AFL-CIO states as follows:

1. The AFL-CIO filed a brief *amicus curiae* in this case with the consent of the parties. In that brief, we deferred discussion of the standing issue under § 4 of the Clayton Act presented here until after this Court decided *Blue Shield, Inc. of Virginia v. McCready,* No. 81-225. As we explained in our brief (at 21):

> As briefed and argued by the parties, the *Blue Shield* case has many points in common with the present and the decision therein, even if it is not dispositive, is likely to clarify the analysis of the § 4 issue. We therefore believe that it would be premature to brief the § 4 issue now, and shall instead move for leave

> to file a short supplemental memorandum discussing the § 4 issue in the light of the decision in *Blue Shield* promptly on that decision issuing.

We thought then, and on reflecting think now, that in light of the paucity of precedent on the § 4 issue in this Court and the confusion in the lower court cases, that speculating on the state of the law after *Blue Shield* would have been of little assistance to the Court in analyzing this case.

2. On June 21, 1982, this Court issued its decision in *Blue Shield*. The accompanying supplemental memorandum is the memorandum that we stated we would seek leave to file. The memorandum is limited to the § 4 standing issue, and focuses on the teaching of *Blue Shield* with respect to that issue. The memorandum is five pages in length which, when added to our 25 page brief, is within the page limit for *amicus curiae* briefs.

3. The filing of the accompanying memorandum will not prejudice any party or delay the adjudication of this case. Petitioners have not yet filed their reply brief and are not required to do so until seven days before the oral argument in this case which, of course, is three months away. Thus, petitioners will have a full opportunity to respond to our supplemental memorandum (as well as our main brief) in their reply brief.

CONCLUSION

For the foregoing reasons, this motion for leave to file a supplemental memorandum *amicus curiae* should be granted.

Respectfully submitted,

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SUPPLEMENTAL MEMORANDUM OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This supplemental memorandum *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said memorandum. The memorandum addresses the standing of the respondent unions to seek damages under § 4 of the Clayton Act, 15 U.S.C. § 15.[1]

ARGUMENT

1. The respondent unions' complaint in this case alleges that the unions themselves suffered economic injury as a result of the petitioners' conspiracy to boycott contractors and subcontractors which had signed collective bargaining agreements with the unions. In briefs filed prior to this Court's decision in *Blue Shield of Virginia v. McCready*, —— U.S. ——, 50 L.W. 4723 (June 21, 1982), petitioners (and several *amici curiae*) argued that

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[1] In our main brief we demonstrated that the § 4 issue "need not be reached . . . because . . . the complaint states a claim for injunctive relief under § 16 of [the Clayton] Act," AFL-CIO Br. at 21. In addressing the § 4 issue here, we do not retreat from our view that given the existence of standing under § 16, the Court should "avoid[] an essentially abstract ruling under § 4" at this point, *id.*

the unions nonetheless lack standing to seek redress for the injuries suffered as a result of petitioners' wrongful conduct. As we proceed to demonstrate, *Blue Shield* defeats that contention.

In *Blue Shield*, the respondent was covered by a health insurance policy, purchased by her employer, that provided reimbursement for treatment by psychiatrists, but not for treatment by psychologists unless the latter's services were supervised by and billed through a psychiatrist. The insured, who was treated by an unsupervised psychologist, filed suit under § 4 of the Clayton Act against the insurer, alleging an unlawful conspiracy to restrain competition in the psychotherapy market by driving psychologists from that market. The insurer argued that the insured lacked standing to bring such a suit since she was neither an injured competitor of the conspirators nor a purchaser of health insurance and since she had not been required to pay more for her treatment as a result of a lessening of competition among psychotherapists. This Court rejected the standing argument and held that because petitioner had suffered "economic injury" which was a necessary and foreseeable part of the anticompetitive scheme she did have standing to sue. *Id.* at 4725 n.11, 4727-28.

2. The Court began its analysis in *Blue Shield* by emphasizing the breadth of § 4, stating:

> Section 4 of the Clayton Act provides a treble-damages remedy to "[*a*]*ny person* who shall be injured in his business or property by reason of *anything* forbidden in the antitrust laws. 15 U.S.C. § 15 (emphasis added). As we noted in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1970), 'On its face, § 4 contains little in the way of restrictive language.' And the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. As we have recognized, '[t]he stat-

> ute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.' [50 L.W. at 4724; citations omitted]

The Court concluded that "the unrestrictive language of the section, and the avowed breadth of the Congressional purpose, caution us not to cabin § 4 in ways that will defeat its broad remedial objectives," *id.* at 4726; rather "in the absence of some articulable considerations of statutory policy," § 4 is to be "applied . . . in accordance with its plain language and its broad remedial and deterrent objective," *id.* at 4725.

3. The *Blue Shield* Court recognized that "drawing on statutory policy, our cases have acknowledged two types of limitations on the availability of the § 4 remedy to particular classes of persons and for redress of particular forms of injury," *id.* Neither of the limitations to § 4 is applicable here.

(a) The first limitation discussed in *Blue Shield* is a prohibition on "duplicative recovery"; *viz*, antitrust violators are not to be subjected to double recovery for the *same* injury, *id.* This case does not raise such a possibility. While the unionized contractors and subcontractors undoubtedly have been injured by the conspiracy at issue here, the contractors have suffered types of injuries *different* from the types of injuries suffered by the unions. The contractors who remained unionized have lost profits as a result of the conspiracy; the unions have lost dues payments. And *Blue Shield* teaches that when two victims have suffered separate injuries from an antitrust violation, allowing each to recover does not involve a double recovery. *Id.* at 4728 n.21.

(b) *Blue Shield* also recognizes that recovery for injuries which are "'*too remote* from an antitrust violation'" is not allowed. *Id.* at 4727 (emphasis in original). The injury the unions here suffered is not remote at all. The complaint alleges that petitioners set out on a conspiracy designed to destroy both the unions and the contractors who had collective bargaining relationships with the unions. The unions' injury was not simply foreseeable, that injury was an *intended and necessary result of the petitioners' unlawful conduct.* In the words of *Blue Shield*, the injury to the unions here is "inextricably intertwined with the injury the conspirators sought to inflict on [their competitors]," *id.* at 4727; the unions' injury " 'flows from that which makes defendants' acts unlawful,' " *id.* at 4727-28; and the unions suffered "precisely the 'type of loss that the claimed violations . . . would be likely to cause,' " *id.* at 4726. Thus, the unions' injury here "falls squarely within the area of congressional concern," *id.* at 4728.

It is, of course, true that the unions here are neither competitors of the petitioners nor purchasers of petitioners' services. But that was equally true in *Blue Shield*: Ms. McCready was injured as a *beneficiary* of an insurance plan "that was, in fact, purchased and retained by her employer for her benefit," *id.* at 4727. Notwithstanding Ms. McCready's status as a mere beneficiary, the Court held that the close nexus between the attempted restraint on the psychotherapy market and the losses she suffered entitled her to recover her damages. Similarly, here, the injury to the unions is an integral component of the unlawful restraint on the contractors' and subcontractors' markets—indeed, inflicting that injury is the raison d'etre of the restraint—and not a mere happenstance nor a remote consequence of the restraint.

Indeed, the instant case is analytically indistinguishable from the "secondary boycott" hypothetical the Court addressed in *Blue Shield. Id.* at 4728 n.21. In that hypothetical, "a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists," *id.* The Court had "no doubt" that both the bank (as the initial victim) and the psychologists (as the ultimate target) had standing to sue under the Clayton Act. *Id.* Similarly here, the unionized contractors (as initial victims) are being used in an attempt to destroy the unions (the ultimate target) and both have a § 4 right to sue for their damages.[3]

CONCLUSION

For the reasons stated in the AFL-CIO's brief *amicus curiae* and in this memorandum the decision below should be affirmed.

Respectfully submitted,

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[3] The brief of the United States, as *amicus curiae*, argues (at 28-30) that the unions should be denied standing because of the practical difficulties that might arise in proving the amount of damage caused by the antitrust violation. *Blue Shield* refutes this contention.

In responding to such a concern in *Blue Shield*, this Court quoted from *Bigelow v. RKO Pictures*, 327 U.S. 251, 265 (1946): "difficulty of ascertainment [should not be] confused with a right of recovery." Only in "certain limited circumstances"—"[w]here consistent with the broader remedial purposes of the antitrust laws"—can "the feasibility and consequences of implementing particular damage theories . . . be considered in determining who is entitled to prosecute an action under § 4." 50 L.W. at 4725 n.11.

Here, the respondent unions have suffered a "tangible economic injury," *id.*, through decreased dues payments, and it would be inconsistent with the "broad[] remedial purposes" of § 4 to preclude the unions from prosecuting this action, *id.* Moreover, the only difficulty of proof to which the United States points is in separating out the amount of the losses caused by the antitrust violation from losses caused by extrinsic causes. That same analysis is required in every antitrust case. Thus, this "difficulty of ascertainment" cannot, at least at this preliminary stage of the case, justify the dismissal of the unions' compliant.

Amicus Brief

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No. 81-334

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,
Petitioner,

v.

CALIFORNIA STATE COUNCIL OF CARPENTERS
AND CARPENTERS 46 NORTHERN COUNTIES
CONFERENCE BOARD,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER AND BRIEF OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

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MOTION OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Associated General Contractors of America, Inc., ("AGC") respectfully moves this Court, pursuant to Supreme Court Rule 36(1), for leave to file the accompanying brief in this case as *amicus curiae* in support of the petitioner. In support of this motion, AGC shows as follows:

1. This motion is necessitated by the failure, upon request, of the California State Council of Carpenters and Carpenters 46 Northern Counties Conference Board

to give written consent to the filing of a brief by AGC as *amicus curiae*.

2. AGC is a national trade association consisting of 113 state and local chapters and representing 30,000 firms, including approximately 8,400 of America's leading general contracting firms, engaged in the construction industry in the United States and Puerto Rico. AGC member firms are responsible for the employment of approximately 3,500,000 employees. Construction is the largest industry in the United States, and the members of AGC perform approximately 80% of the general contracting construction business performed in the United States each year, including the construction of commercial buildings, highways, industrial and municipal-utility facilities.

3. The AGC regularly represents the interests of its general contractor members in important matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the Federal Government. This includes rendering assistance to courts in their deliberations on significant decisions concerning labor-management relations in the construction industry.

4. The specific question presented by this case is whether the Court of Appeals for the Ninth Circuit erred in concluding that a valid antitrust claim under the Sherman Act is alleged when a union contends that a multi-employer bargaining association and its members have conspired to breach existing collective bargaining agreements and to disrupt an existing collective bargaining relationship.

A reversal of the Ninth Circuit decision is particularly vital to the interests of the AGC, its members and their employees. The construction industry relies heavily on the stability provided by multi-employer bargaining relationships. Yet the lower court's decision provides a basis for unions to use the threat of treble antitrust damages to reduce the effectiveness of group action in dealing with construction labor unions. Certainly, this development is a matter of great concern to such employers.

Until the Ninth Circuit is reversed, the members of AGC could be greatly restricted in their use of economic weapons to combat demands of construction unions. AGC respectfully submits that it is in a unique position to present argument and analysis on behalf of the construction industry in assisting this Court in its consideration of these vital issues.

WHEREFORE, it is respectfully moved and requested that the AGC be granted leave to file the accompanying brief as *amicus curiae.*

Respectfully submitted,

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CONFERENCE BOARD,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF THE PETITIONER

The Associated General Contractors of America, Inc. ("AGC") hereby submits this brief in support of the petitioner in No. 81-334 on a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on October 5, 1981.

INTEREST OF THE *AMICUS CURIAE*

A statement describing the AGC and its interest in this case is set forth in the preceding motion requesting leave to file this *amicus curiae* brief.

SUMMARY OF ARGUMENT

The dispute between the plaintiff unions and the defendant employers in this case is a labor dispute, not an antitrust dispute. The unions have alleged that the defendant employers have combined to breach existing collective bargaining agreements and to disrupt an existing collective bargaining relationship. If the alleged action of the defendant employers is to be governmentally regulated at all, national labor policy dictates that that regulation must come from the nation's labor laws, not from antitrust statutes. Further, even if this were not a labor dispute the antitrust laws were never intended to protect the employee representation aspect of a labor union's business, and the union plaintiffs do not have standing to bring an antitrust action because of injury to nonparty employers allegedly affected by the actions of the employer defendants in this case.

Because the Ninth Circuit Court of Appeals held to the contrary on all counts, it is respectfully submitted that this Court should reverse.

ARGUMENT

A. The Ninth Circuit Erred In Concluding That This Case Involved Other Than A Labor Dispute And In Concluding, Therefore, That The Antitrust Laws Were Applicable To The Dispute Between The Plaintiff Unions And Defendant Employers.

The Ninth Circuit has misread the plaintiff unions' allegations in their first amended complaint, and, in so doing, has portrayed this case as one concerned with the concerted activities of an employer group which were not related to a collective bargaining dispute with the unions but rather constituted a direct restraint on business competition (648 F.2d 527, 531). Thus, the Circuit concluded that the defendant employers had simply combined to refuse to hire nonunion subcontractors, and that such a combination, if proven, would constitute a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) under authority of this Court's decision in *Connell Construction Co. v. Plumbers and Steamfitters, Local 11*, 421 U.S. 616 (1975).

By so holding, the Ninth Circuit has endorsed the startling proposition that a labor organization may use the weapon of antitrust treble damages to achieve its own objectives in a labor dispute with its management adversary. Such a result not only ignores a considerable body of case law holding that antitrust law is not concerned with the "labor market per se",[1] but also is inconsistent with the federal labor policy encouraging labor and management to use their economic weapons to resolve labor disputes.

Because the Ninth Circuit's decision is based upon a misapprehension of the dispute described by the union plaintiffs' complaint, we turn first to the unions' allegations. We then show that this Court's *Connell* decision and our nation's basic labor policy are inconsistent with any conclusion that the antitrust laws were intended to apply to this dispute.

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[1] *See e.g., Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

An analysis of the complaint allegations in this case reveals that the employer group conduct at issue involves an existing labor controversy between the parties. Hence, the complaint avers that the plaintiff unions and defendant association and its members have had a collective bargaining relationship for over 25 years. At the time of the filing of the suit, they were parties to three master collective bargaining agreements covering the carpentry, drywall and piledriving industries (First Amended Complaint, Pars. VIII and XII).[2] It is this entrenched multiemployer collective bargaining relationship that the defendant employers are said to have sought to weaken and destroy by a general conspiracy (Par. XXIII).

It is further alleged that certain acts engaged in by the employer association and its members were taken pursuant to this alleged conspiracy. Those alleged acts include creating double breasted operations which maintain nonunion status; establishing *alter ego* operations to avoid collective bargaining responsibilities; encouraging nonmember employers not to execute collective bargaining agreements with the plaintiffs; refusing to use the unions' hiring halls and to pay contractual wage scales and fringe benefits; and coercing owners and general contractors to hire nonunion general contractors or subcontractors (Par. XXIV, Subparagraphs 1-5). It is alleged that all of this conduct was in support of an attempt to avoid obligations imposed by the collective bargaining relationship (Par. XXIV, Subparagraph 7).

In addition, another count in the complaint alleged that all of the above-stated conduct involved breaches of the three collective bargaining agreements,[3] and that the defendant employers used nonunion subcontractors as a means of avoiding their contractual obligations (Par. XXX). In other words, the plaintiff unions contend that the defendants are not complying with the union signatory subcontracting clauses of their labor agreements.

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[2] References to the First Amended Complaint shall hereafter be to the paragraph numbers only.

In sum, *all* the asserted conspiratorial acts set forth in the complaint allege breaches of existing labor contracts and efforts by employers to undermine the collective bargaining relationship of the parties.[4] In short, the plaintiff unions contend that they have a labor dispute with the defendant multi-employer association.[5]

It is clear that this Court's *Connell* decision does not support a conclusion that such a dispute is to be regulated by the nation's antitrust laws. Thus, the *Connell* decision found the antitrust laws to be applicable to a dispute between labor and management because it arose outside the context of a collective bargaining relationship. Indeed, this Court stressed that

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[3] The Ninth Circuit affirmed the District Court's decision that the Section 301 claim of breach of contract could not stand due to the plaintiffs' failure to exhaust its remedies. 648 F.2d at 539.

[4] Plaintiff unions' incidental allegation in the complaint that union subcontractors were adversely affected by the defendant employers' conduct does not transform this labor controversy into a justiciable antitrust cause of action. It is without question that the thrust of the entire complaint demonstrates that the unions are primarily concerned with their position as the collective bargaining representative of their 50,000 unit employees, and not with the impact of the employers' conduct on commercial interest.

[5] The focus under a motion to dismiss must be whether it is clear that plaintiffs would be entitled to no relief under any state of facts that might be proved in support of the allegations made in the complaint. *Conley v. Gibson*, 355 U.S. 41, 47, (1957). In testing the legal sufficiency of the complaint the well-pleaded allegations are taken as admitted but conclusions of law and unreasonable inferences on unwarranted deductions of fact are not admitted. See 2A Moore's Federal Practice § 12.08 p. 2244. This observation is particularly appropriate herein because the unions' arguments are premised upon an unreasonable characterization of the facts.

> [t]here can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective bargaining agreement. (Citations omitted) In this case, Local 100 had no interest in representing Connell's employees. The federal policy favoring collective bargaining therefore can offer no shelter from the union's coercive actions against Connell or its campaign to exclude nonunion firms from the subcontracting market. 421 U.S. at 625-626.[6]

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[6] *Connell* is further distinguishable from the instant case on a number of grounds. Thus, in *Connell* the union imposed on the company a clearly illegal clause in violation of Section 8(e) of the National Labor Relations Act. Therefore, the agreement obtained by the union was not privileged by federal labor laws. In contrast, the activities attacked by the complaint in the instant case are not, as alleged, clearly unlawful. For example, the refusal of a nonunion double breasted operation to recognize the union is an arguable violation of Section 8(a)(5) of the NLRA depending on whether the two firms constitute a single employer and whether their employees constitute a single appropriate unit. *South Prairie Construction Company v. Operating Engineers*, 425 U.S. 800 (1976). Similarly, the refusal to abide by a restrictive union signatory subcontracting clause during a contract term may amount to an unlawful modification of the contract in violation of Section 8(a)(5) of the NLRA. On the other hand, a refusal to abide by the provisions of such a subcontracting clause may also be lawful conduct if the clause is illegal under Section 8(e) of the Act. For example, the 1971-1974 master agreement of plaintiffs' sister Los Angeles Carpenters District Council has been held to have an unlawful subcontracting clause because it contains self-help provisions. *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, —— U.S. ——, 49 USLW 3825 (1981). Therefore, the most that can be said about the plaintiff unions' allegations is that they state an arguable violation under the NLRA. It would indeed be ironic, as dissenting Judge Sneed observed, if the majority below has provided the plaintiff unions the opportunity to attain the massive "top-down" organizing effect so disfavored by Congress through the backdoor of antitrust law.

Although the Ninth Circuit believed that this Court's *Connell* decision supported a labor policy exemption from the antitrust laws only for matters set forth in a collective bargaining agreement, it is submitted that the Circuit is wrong. This Court has never held that conduct by an employer group in response to a union's representation claims is subject to antitrust scrutiny unless that conduct relates to a provision of a collective bargaining agreement.

The view of the Ninth Circuit in this case simply fails to give appropriate recognition to the congressional policy favoring collective bargaining under the National Labor Relations Act. It is the collective bargaining process itself and not just its final product (a collective bargaining agreement) that Congress sought to foster by such legislation.[7] Thus, this Court has held that Congress understood that parties to the bargaining process would occasionally engage in economic warfare in order to resolve their disputes. Further, in order for the bargaining process to work as envisioned by Congress, both parties were to have a relatively free rein in the use of economic weapons, and were to be restrained only in those areas where Congress, in its labor laws, decided that the weapon was to be outlawed.[8]

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[7] See *Conley v. Gibson, supra*, 355 U.S. at 46, where the court held that "collective bargaining is a continuing process" which is concerned with the day-to-day adjustments in the contract and working rules and the resolution of problems not covered by the existing agreements. Accord: *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

[8] *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. Oliver*, 358 U.S. 283 (1959); *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 143-44 (1976), *quoting NLRB v. Insurance Agents' International*, 361 U.S. 477 (1960):

> We noted further that "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions" and "the activities here involved have never been

The policy protecting the entire collective bargaining process from undue governmental interference has gained specific Congressional approval in the area of multi-employer bargaining units. Mr. Justice Brennan in *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957), had occasion to review the Congressional view on the desirability of multi-employer bargaining (353 U.S. at 94-96):

> . . . At the time of the debates on the Taft-Hartley amendments, proposals were made to limit or outlaw multi-employer bargaining. These proposals failed of enactment. They were met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining.
>
> The debates over the proposals demonstrate that Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining. The inaction of Congress with respect to multi-employer bargaining cannot be said to indicate an intention to leave the resolution of this problem to future legislation. Rather, the compelling conclusion is that Congress intended "that the Board should continue its established administrative practice of certifying multi-employer units, and intended

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specifically outlawed by Congress." Id., at 498, 4 L. Ed. 2d 454, 80 S. Ct. 419. Accordingly, the Board's claim "to power . . . to distinguish among various economic pressure tactics and brand the ones at bar inconsistent with good-faith collective bargaining," id., at 492, 4 L. Ed. 2d 454, 80 S. Ct. 419, was simply inconsistent with the design of the federal scheme in which "the use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining." Id., at 495, 4 L. Ed. 2d 454, 80 S. Ct. 419.

> to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future." (Footnotes omitted.)

Many lower courts have recognized these vital policy considerations and have applied the nonstatutory labor exemption to employer groups' unilateral conduct. For example, see *Amalgamated Meat Cutters v. Wetterau Foods*, 597 F.2d 133 (8th Cir. 1979) (employers' arrangement to obtain temporary strike replacements); *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers of America*, 431 F.2d 1004 (5th Cir. 1970) (alleged conspiracy between two companies to avoid unionization); *Plumbers and Steamfitters, Local 598 v. Morris*, 511 F. Supp. 1298 (E.D. Wash. 1981) (multi-employer association and its members engaged in a lockout); *Carpenters Local 1846 v. Pratt-Farnsworth*, 511 F. Supp. 509 (E.D. La. 1981) (refusal to bargain by a firm alleged to be a single employer with another company).

In sum, neither *Connell* nor the basic labor policy of this nation supports the Ninth Circuit's conclusion that the labor dispute in this case is subject to regulation under the antitrust laws.

B. The Complaint's Failure To Indicate A Restraint Upon Commercial Competition In The Marketing Of Goods and Services Places The Plaintiffs' Claim Beyond The Ambit Of Antitrust Law.

This Court in *Apex Hosiery*, *supra*, has endorsed the proposition that the Sherman Act is not concerned with the labor market *per se*, but rather is concerned solely with restraints in commercial markets. In affirming the dismissal of the complaint on the basis of lack of jurisdiction under the antitrust laws, the Court stated (310 U.S. at 495):

> . . . [T]his Court has never applied the Sherman Act in any case, whether or not involving labor organiza-

> tions or activities, unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods and services. . . .

The Court further recognized that many unilateral activities either by unions or groups of employers, such as strikes and lockouts, may very well influence competition in goods or interrupt the course of trade, but that this was not the form of restraint contemplated by the Sherman Act.[9] And this Court reaffirmed that position in *Connell* when it held that the antitrust laws were applicable "when a union and a nonlabor party agree to restrain competition in a *business* market." 421 U.S. at 622-23 (emphasis added).

In the instant case, the plaintiff unions are complaining of collective bargaining obstruction and consequent injury to their ability to act as employee representatives. Implicit in the complaint is that the parties to the master agreements have been dealing with each other at arms length, pursuing their own self-interest.[10] As recently stated in *Plumbers and Steamfitters Local 598 v. Morris*, *supra*, 511 F. Supp. at 1307 (emphasis in original):

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[9] Commentator Theodore St. Antoine, in considering the teachings of *Apex*, stated:

> The *Apex Hosiery* approach was not a matter of a statutory union exemption; the Sherman Act, as written, would simply not apply to a certain class of restraints. Employers, or employers in combination with unions, would presumably be as free as unions acting alone to halt competition grounded in wage differentials. In short, the Sherman Act would be confined to restraints on the product market, and the labor market would be beyond its ken. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603, 606 (1976).

[10] Therefore, the holding of this Court in *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797, 809-10 (1945) is inapposite. In *Allen Bradley* the union lost its statutory exemption because it acted in collusion with a nonunion group to achieve an anticompetitive purpose. This same lack of arms length relationship distinguishes the line of cases involving "sham" unions. *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976); *Carpenters Dis-*

> The natural competitive relationship between [the union] and [employer association], directly connected to these organizations "raison d'etre," is not in the realm of *commercial* competition. Rather it is in the realm of pure economics—the historical struggle between management and labor with each attempting to maximize its own interests. The labor laws and not the antitrust laws regulate this struggle.

Thus, a union is not injured in an antitrust sense by tactics designed to limit labor's expectations and demands.[11]

This does not mean that union plaintiffs are left without remedies. As explained in the preceding section of this brief, these remedies include economic weapons which the labor laws have fostered and protected. Thus, the union plaintiffs may resort to a variety of steps to counter the employers' activities. First, they may, as they have in this case, use the master contracts' grievance machinery to contest the alleged breach of contract by the defendant employers.[12] The union plaintiffs also have the

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trict Council v. United Contractors Association of Ohio, Inc., 484 F.2d 119 (6th Cir. 1973), *modified*, 539 F.2d 1092 (6th Cir. 1976); *International Association of Heat and Frost Insulators and Asbestos Workers v. United Contractors Association, Inc. of Pittsburgh*, 483 F.2d 384 (3d Cir. 1973), *modified*, 494 F.2d 1353 (3d Cir. 1974). There is neither a competing union nor a sham union involved in this case and defendants do not seek to establish a company-dominated labor organization or infiltrate the plaintiff unions' offices.

[11] As the court said in *Kennedy v. Long Island Railroad*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963), in response to the contention of the plaintiff union that the price of labor was artificially manipulated by the employers: "The answer lies in the clear language of section 6 of the Clayton Act, 15 U.S.C. § 17: 'The labor of a human being is not a commodity or article of commerce.' "

[12] Not only does the parties' resort to their grievance procedure reinforce the labor dispute aspect of the plaintiffs' claim, it also

option of filing unfair labor practice charges with the National Labor Relations Board alleging that the employer defendants have refused to bargain collectively in good faith or have discriminated against employees because of their union membership. They could also organize the employees of present nonunion contractors (including the employees of the alleged double-breasted construction companies) and file election petitions with the NLRB. Finally, they could rely on their own economic resources and strike the employer defendants at the expiration of the master contracts, or, if the contracts permit, engage in strikes during the term of the agreements.

Notwithstanding this arsenal of weapons available to the unions to protect their representative status, they seek here to obtain an undue advantage in their labor struggle with the employer defendants by resort to the antitrust laws. Stated in another manner, the plaintiffs, who possess complete statutory immunity from the antitrust laws when they engage in economic warfare against employers, seek to hold their adversary liable under the antitrust laws for engaging in similar conduct on the labor battlefield.

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raises a serious policy question. In *Republic Steel Corporation v. Maddox*, 379 U.S. 650 (1965), the Court discussed the policies supporting contractual grievance procedure utilization. As a general rule, the Court stated the federal labor law requirement that parties asserting contract grievances must exhaust their contractual remedies. Otherwise, the side-stepping of the grievance process in favor of a law suit would deprive the parties "of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances." Such a situation would inevitably exert a "disruptive influence upon both the negotiation and administration of collective agreements." 379 U.S. at 653, *citing Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1963). The same policy argument is applicable to this case where the dispute now before this Court in an antitrust context is identical to the dispute which the plaintiff unions are presenting to an arbitrator under their collective bargaining agreement.

Furthermore, it is essential to consider the broad implications of invoking antitrust sanctions in contexts other than that for which they were originally intended. The Sherman Act "was enacted in the era of 'trusts' and 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. *Apex Hosiery Co. v. Leader*, *supra*, 310 U.S. at 492-493.[13] The indiscriminate application of the Sherman Act beyond its intended bounds into areas governed by the comprehensive regulatory scheme provided by the National Labor Relations Act will only cause an indeterminate amount of delay in the resolution of labor disputes, a result directly contrary to the Congressional desire of prompt hearing and resolution of such disputes.[14]

C. The Unions Lack Standing To Seek Treble Damages For The Alleged Antitrust Violations.

As pointed out in Sections A and B, *supra*, the unions' complaint essentially alleges a labor dispute between the parties—*viz.*, that defendants conspired "to abrogate, destroy, undermine, and weaken the collective bargaining relationship" between the unions and defendants (Par.

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[13] "No one seriously suggests that antitrust policy should be concerned with the labor market *per se*." Cox, *Labor and Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 254 note 2 (1955). This concept has been adopted by lower courts. *Carpenters Local 1846 v. Pratt-Farnsworth*, *supra*; *Amalgamated Clothing & Textile Workers Union v. J. P. Stevens & Co., Inc.*, 475 F. Supp. 482, 489-90 (S.D.N.Y. 1979); *Kennedy v. Long Island Railroad Co.*, *supra*. See also *United Brick and Clay Workers v. Junction City Clay Co.*, 158 F.2d 552 (6th Cir. 1946); *Clune v. Publishers Association of New York City*, 214 F. Supp. 520 (S.D.N.Y.), *aff'd mem.*, 314 F.2d 343 (2d Cir. 1963).

[14] *See, e.g.*, 29 U.S.C. § 160(i) (expeditious hearing of labor cases required in the Courts of Appeals).

XXIII). For the reasons stated in those Sections, such claims are not properly cognizable under the antitrust laws. Nevertheless, the Ninth Circuit seized upon the one *act* allegedly undertaken by defendants "pursuant to" the alleged scheme which might arguably have some viability under the antitrust laws—*i.e.*, the contention that defendants "[a]dvocated, encouraged, induced, coerced, aided and encouraged" other contractors, owners of land, and other letters of construction contracts to hire nonunion contractors and subcontractors (Par. XXIV, Subparagraphs (4) and (5)).[15] Although the unions did allege that the conspiracy had the additional purpose of "restrain[ing] the trade of certain contractors" which further weakened the unions (Par. XXV), it is clear that the unions lack standing to assert this antitrust claim.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble damages for his injury as well as a reasonable attorney's fee. Despite the breadth of this language, lower courts are in agreement, with the apparent approval of this Court,[16] that this section does not require compensation for all injuries which can be causally related to acts which violate the antitrust laws. (See cases cited in *Hawaii v. Standard Oil*, *supra*, 405 U.S. at 262 n. 14.) Realizing that virtually every antitrust violation creates a "ripple effect" of economic impact and injury throughout the economy, these courts have recognized that limitations on standing to sue are necessary to prevent speculative, windfall and ruinous treble damage recoveries (*e.g.*, *Calderone Enterprises Corp. v. United Artists Theatre Circuit*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972)), as well as to prevent the *in terrorem* use of potential treble damages by plaintiffs with remote and speculative claims (*Laurie Visual Etudes v. Chesebrough-Pond's, Inc.*, 473 F. Supp. 951, 955 (S.D.N.Y. 1979)). Accordingly, as noted by the Ninth Circuit in the instant case (648 F.2d at 536-37), most courts have limited antitrust standing by applying so-called "direct injury" or "target area" rules to determine which of the broad spectrum of admittedly injured potential claimants have standing to seek treble damages. As we show below, proper application of these tests requires dismissal of the unions' action because they lack

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[15] Other alleged acts in furtherance of the alleged conspiracy (Par. XXIV) relate to the establishment of alter ego companies, the creation of double-breasted operations, the encouragement of others not to enter into collective bargaining relationships with the unions, the holding of open shop meetings in which the participants were encouraged and aided in maintaining nonunion shops, and breach of the collective bargaining agreement. The Ninth Circuit briefly mentioned some of these other acts taken pursuant to the alleged conspiracy, but then went on to characterize the alleged antitrust violation as a group boycott, virtually ignoring the fact that the whole thrust of the conspiracy allegations with respect to the unions was to the interference with the parties' bargaining relationship. 648 F.2d at 529-30.

[16] In *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-63 n.14 (1972), this Court stated: "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust

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laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."

Further, the Court's decisions in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, *reh. denied*, 434 U.S. 881 (1977) and *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), although not decided under the standing rubric, demonstrate that more is necessary for antitrust monetary relief than mere causal tracing of an economic injury to an act which allegedly violates the antitrust laws. In *Illinois Brick*, the Court held that in an action involving a price-fixing conspiracy, only the overcharged direct purchaser (as opposed to others in the chain of manufacture or distribution) could recover treble damages. In *Brunswick*, the Court held that although plaintiff's alleged injury could be causally traced to the acquisition which allegedly violated the antimerger provisions of the Clayton Act, the injuries were noncompensable because they were not caused by the *anticompetitive* effects of the merger.

standing to press the antitrust claim sanctioned by the Court below.

A proper application of any antitrust standing test requires a determination of which individuals, groups or market segments are directly impacted in a competitive sense by the violation.[17] For example, in minimum price-fixing cases, the overcharged immediate purchaser from the price "fixer" is the most directly impacted. *Illinois Brick Co. v. Illinois, supra.* In addition, the persons who are subject to the price fixing requirement would be directly injured and in the "target area," because the price-fixing would eliminate free competition among those persons. Hence, an antitrust claimant who is neither a direct purchaser of the fixed-price commodity or a seller upon whom the fixed price requirement is imposed would not have standing to recover treble damages for the illegal price-fixing. *Hardwick v. Nu-Way Oil Co.*, 443 F. Supp. 940, 944 (S.D. Tex. 1978), *aff'd on other grounds*, 589 F.2d 806 (5th Cir.), *cert. denied*, 444 U.S. 836 (1979). Where violations involve tying arrangements, on the other hand, "[t]he common core of the adjudicated unlawful . . . arrangement is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market." *Times Picayune Publishing Co. v. United*

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[17] As characterized by the Ninth Circuit in the instant case (648 F.2d at 537-38), the "direct injury" rule permits recovery only by those whose injury is the direct result of the anti-competitive activity, and application of the rule focuses on the relationship between the alleged violator and the claimant. The "target area" test, on the other hand, permits recovery only by those "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Conference of Studio Unions v. Loew's*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). As pointed out, *infra*, the Ninth Circuit has also read into the target area test a foreseeability aspect that it has here used to impermissibly expand standing to seek monetary relief under the antitrust laws.

States, 345 U.S. 594, 614 (1953). Hence, the anticompetitive effects of such an agreement will be felt directly by the purchasers required to forego substitutes for the tied product and by competing suppliers of the tied product to the consuming market. *United States v. Lowe's, Inc.*, 371 U.S. 38, 45 (1962). Accordingly, an antitrust plaintiff who neither sells the tied product nor buys it from the defendant lacks standing to seek treble damages for injuries allegedly resulting from the unlawful tying arrangement. *Southern Concrete Company v. United States Steel Corp.*, 535 F.2d 313 (5th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977). And finally, in situations such as the instant case in which the alleged violation is a group boycott of certain contractors and subcontractors, the anticompetitive effects of the alleged boycott will directly impact on the boycotted companies and the boycotting companies which must deal in a limited, noncompetitive market. Thus, in *Klor's v. Broadway-Hale Stores*, 359 U.S. 207 (1959), a case involving an alleged conspiracy by manufacturers and distributors not to sell to Klor's or to sell to it only on unfavorable terms, this Court delineated the following anticompetitive harm flowing from the alleged violation (359 U.S. at 213):

> This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever.

In each of the foregoing types of antitrust violations, the area of primary impact is, of course, not the only area of impact or injury resulting from the unlawful action. Thus, for example, in the case of a victim that is forced out of business because of a group boycott, the boycott might indirectly injure numerous other groups or individuals because of their special relationships with the primary target—*e.g.*, shareholders who lose their investments, landlords who lose or derive less income from a lease, suppliers who lose a customer, creditors against whom the victim defaults, customers who have enjoyed profitable relations with the victim, and employees of the demised business. But despite the existence of such "injury in fact" resulting from the alleged antitrust violation, courts, whether under the "direct injury" or "target area" approach, have often denied standing to such secondary victims of antitrust violations.[18]

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[18] See, for example, *Calderone Enterprises Corp. v. United Artists Theatre Circuit, supra* (alleged conspiracy to restrain trade in distribution and exhibition of motion pictures was aimed at competing distributors and exhibitors, and exhibitor's landlord with a percentage lease lacked standing because he had been damaged only by virtue of his economic relationship with exhibitor); *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956) (plaintiff patent owner lacks standing to recover from defendant lost royalties caused by defendant's demand that purchasers of its product not deal with defendant's competitors, including plaintiff's patent licensee); *Laurie Visual Etudes v. Chesebrough-Pond's, Inc., supra*, (patent licensor lacks standing to recover for loss of royalties caused by a monopoly or conspiracy harming the business of its licensee); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 394 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963) (supplier lacks standing to recover for loss of sales to customer whose demand for supplier's products was reduced because of anticompetitive effects of defendant's illegal activities); *Nationwide Auto Appraiser Service, Inc. v. Association of Casualty and Surety Companies*, 382 F.2d 925 (10th Cir. 1967) (plaintiff franchisor could not recover treble damages for injuries resulting from anticompetitive effects of defendant's actions on plaintiff's franchisee); *Jones v. Ford Motor Co.*, 599 F.2d 394 (10th Cir. 1979) (shareholder/employee could not recover for losses incurred when corporation was forced out of business because of defendant's allegedly anticompetitive activities); *Gutierrez v. E. & J. Gallo Winery Co., Inc.*, 604 F.2d 645 (9th Cir. 1979) (farm worker plaintiffs could not recover for injuries occasioned by loss of work due to defendants' alleged antitrust violations); *Contreras v. Grower Shipper Vegetable Ass'n of Central California*, 484 F.2d 1346 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974) (agricultural employees

In the instant case, the direct victims or the target area of the alleged boycott are easy to identify: they are the union contractors and subcontractors whose competition with their nonunion counterparts has been restricted or eliminated and the letters of construction contracts or subcontracts who, by agreement, encouragement, or coercion, are confined to a limited market from which to select their contractors or subcontractors. To be sure, there may be collateral victims who have suffered adverse economic consequences because of their relationship with the direct victims. Indeed, a prime example of such collateral victims would be employees of the allegedly boycotted contractors who may have lost work because their employers were competitively disadvantaged vis a vis nonboycotted contractors. But such derivative injuries of employees occasioned by antitrust violations against their employers are not within the target area of the antitrust violation here alleged. (*See* cases cited in n. 18, *supra.*) Even further removed are the unions' injuries which have supposedly resulted from the alleged boycott. Thus, the unions contend that the reduction in work for its members who are employed by the boycotted employers has resulted in the loss of dues to the unions and that the alleged boycott has made it more difficult to organize employees, which, in turn, has resulted in a further loss of dues. As the district court stated in *Bywater v. Matsushita Electric Industrial Co., supra,* 1971 Trade Cases ¶ 73,759 at p. 91,208:

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alleging conspiracy to raise prices of farm products by limiting production lacked standing to recover treble damages for loss of work occasioned by defendants' allegedly unlawful conduct); *Reibert v. Atlantic Richfield Co.,* 471 F.2d 727 (10th Cir. 1972), *cert. denied,* 411 U.S. 938, *reh. denied,* 412 U.S. 914 (1973) (employee who lost job when his employer merged with defendant lacked standing to challenge legality of merger); *Bywater v. Matsushita Electric Industrial Co.,* 1971 Trade Cases ¶ 73,759 (S.D.N.Y. 1971) (employees and their union lack standing to recover damages for loss of wages, benefits and union dues which resulted when employer was forced out of business by defendants' allegedly unlawful conduct).

> If the unions are permitted to sue because they have lost dues because the employees have lost their jobs [as a result of an alleged conspiracy which had put their employer out of business], it is hard to see why a grocer, for example, could not sue on the theory that he has sold less food to the employees because they have less money because their employer has been injured. To relax the requirement of standing to this extent would, as a practical matter, abolish it entirely.

See also, *Nassau County Ass'n of Insurance Agents v. Aetna Life & Casualty Co.*, 497 F.2d 1151 (2d Cir.), *cert. denied*, 419 U.S. 968 (1974) (association of insurance agents lacks standing to recover for loss of dues and members resulting from termination of member insurance agents pursuant to allegedly anticompetitive practices of defendant insurance companies); *Conference of Studio Unions v. Loew's, Inc., supra.*[19] *Cf. N.A.A.C.P. v. New York Clearing House Ass'n*, 431 F. Supp. 405 (S.D.N.Y. 1977) (plaintiffs, equal employment organizations and individual females allegedly denied employment opportunities, lack standing to challenge alleged conspiracy by New York banks to refuse to contract with New York City for specialized financial and data processing services until the City withdrew or modified the affirmative action requirements in such contracts; the City was the object of the conspiracy, and plaintiffs would suffer injury only indirectly).

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[19] Despite its decision in the instant case, the Ninth Circuit denied standing to employees and their unions under analogous allegations in *Conference of Studio Unions*. In that case, plaintiffs alleged a conspiracy between the "major" motion picture companies and a rival union, I.A.T.S.E., whereby the "majors" would employ only I.A.T.S.E. members to the exclusion of members of plaintiff unions and I.A.T.S.E., in turn, would charge the smaller, "independent" companies higher rates and would impose conditions more onerous to the "independents." The individual plaintiffs alleged that they had lost wages as a result of the conspiracy and union plaintiffs claimed loss of revenues and various out-of-pocket expenditures incurred in seeking work for their members and an agreement with the "majors." Nevertheless, the court held that the anticompetitive purpose and effect of the conspiracy was to drive the "independents" out of business and that plaintiffs' alleged injuries did not flow from injury to the competitive situation in the motion picture industry.

This *amicus curiae* submits that the Ninth Circuit's reasoning in the foregoing case is the correct analysis to be applied in the instant case and, accordingly, that the decision *sub judice* should be reversed.

In the instant case, the Ninth Circuit has impermissibly expanded the doctrine of standing under the antitrust laws to permit suit by those who should be denied standing from both a precedential and a policy standpoint. Thus, the appellate court has added to the standing analysis a "foreseeability" criterion which would extend antitrust standing to all plaintiffs within the area of the economy which the violator "reasonably could have or did foresee would be endangered by the breakdown of competitive conditions." 648 F.2d at 537-38.[20] Although the Court retained the "area of the economy" language from the traditional standing test, the standard being applied is essentially one of whether it is reasonably foreseeable that the plaintiff would have been injured by the actions which allegedly violate the antitrust laws. Such a test, we submit, would, under traditional notions of "foreseeability," extend antitrust standing to all who have been injured in fact by the defendant's actions, because the "ripple effects" of antitrust violations are both extensive and highly foreseeable.

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[20] The Court also suggests that because the unions allege that injury to their business was not only foreseeable, but was the intended result, they necessarily have standing to sue under the antitrust laws. However, assuming *arguendo* that the unions can be deemed the "direct victims" or "targets" in this case, they are direct victims not of the alleged antitrust violation (boycotting of contractors and subcontractors), but, rather, of the alleged conspiracy to undermine or destroy their collective bargaining relationship with defendants. The latter matter, as previously stated, is one of labor law rather than antitrust law.

This *amicus curiae* submits that in order to comport with the ultimate goal of confining "the availability of [treble damage] relief only to those individuals whose protection is the fundamental purpose of the antitrust laws," (*In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied sub. nom. Morgan v. Automobile Manufacturers Ass'n*, 414 U.S. 1045 (1973), *reh. denied*, 414 U.S. 1148 (1974)), the appropriate test for standing under the antitrust laws is much narrower than the one the Court applied in this case. Thus, as discussed above, standing to sue must be limited to those affected, in an anticompetitive sense, by violation in question[21]—*e.g.*, in an illegal tying arrangement, the sellers and buyers of the tied product whose free competition is the fundamental purpose of the provisions making such conduct illegal.

In the instant case, as previously stated, the entities to be protected from the alleged boycott are the contractors who are boycotted and the letters of construction contracts—not the creditors of such contractors, not the landlords of such contractors, or, more importantly, not the employees of such contractors or the unions who represent or seek to represent them.

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[21] For this reason, we submit that the cases involving "sham" unions (see n. 10, *supra*), although distinguishable from the instant case, were wrongly decided.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be reversed and the unions' complaint dismissed.

Respectfully submitted,

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Amicus Brief

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October Term, 1981

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,

through their Petitioner,

v.

CALIFORNIA STATE COUNCIL OF CARPENTERS AND CARPENTERS 46 NORTHERN COUNTIES CONFERENCE BOARD,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

This brief *amicus curiae* is filed with the written consent of the parties. The letters giving consent have been separately filed with the Court.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is a federation consisting of more than 4,000 state and local chambers of commerce and trade and professional associations as well as more than 220,000 business firms and individuals who maintain direct membership. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member employers in important labor relations matters before the courts, the United States Congress, the Executive Branch, and the independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance its members' interests in a wide spectrum of labor relations litigation.

The issue before the Court in this case, as viewed by the Chamber—the legitimacy, under the antitrust laws, of a group of employers acting together to further the cause of "double-breasted" operations in the construction industry—is of major importance to Chamber members.

PRELIMINARY STATEMENT

The construction industry was already in economic difficulty well before the advent of the current nation-wide recession. High construction costs have plagued the industry. This hurt not only businesses engaged in construction, but a wide range of consumers—from individual would-be home owners to large manufacturers contemplating expansion.

In some areas of the country and in certain types of construction, one attempted solution for the economic difficulties of this industry has been for some previously unionized construction companies to develop an independent, non-union arm. This has come to be known as "double-breasting."

Associations such as the Associated General Contractors of California, Petitioner here, have engaged in activities to help their members understand the circumstances under which such double-breasted operations may be both helpful and legitimate. Federal labor laws permit double-breasted operations, but carefully regulate the circumstances under which they may be lawfully utilized.

The holding of the Court below has now clouded this area, by holding that activities undertaken by such associations in support of double-breasting are illegitimate under federal antitrust laws. This seems to the Chamber to be both dangerous and unfair.

The Chamber believes that even-handed administration of both the statutory and non-statutory labor dispute exemptions from the antitrust laws demands that the Court of Appeals decision below be overruled and the complaint herein dismissed.

We shall not burden the Court with a detailed statement of the proceedings below, since the parties will doubtless inform the Court in detail as to the posture of the case.

Very simply stated, the Plaintiff-Unions brought an action against the Defendant, an employer association in the construction industry, and its members. The count of the complaint with which we are here concerned involves a claim that the Defendant violated the antitrust laws. The District Court dismissed the complaint, and the Court of Appeals reversed.

Thus, the case is before this Court on the pleadings, and the central issue is whether the facts alleged in the antitrust count are sufficient to state a cause of action under the federal antitrust laws. The Chamber of Commerce of the United States supports the position of the Petitioner, Associated General Contractors of California, Inc., urges the Court to reverse the decision of the Ninth Circuit Court of Appeals and to order the complaint dismissed.

SUMMARY OF ARGUMENT

A. The Ninth Circuit Court of Appeals made a serious error in its reading of the complaint. The complaint does not, as the Court of Appeals found it did, allege a conspiracy or agreement of the nature which was found by this court to have existed in *Connell Construction Co.* v. *Plumbers and Steamfitters Local 100,* 421 U.S. 616 (1975).

In *Connell* there was a specific agreement between the contractor and the Union that the construction work there involved should be contracted *only* to firms that were parties to a current collective bargaining agreement with the Union. *"Only"* is the significant word. For the Court found in *Connell* that the agreement there violated the antitrust laws by excluding from the market all firms which were not parties to an agreement with the Union.

A fair reading of the instant complaint reveals no allegation of such an exclusionary agreement or conspiracy. Any such reading is contrary to the principal thrust of the complaint. The *gravamen* of this complaint is that defendants have engaged in various acts in furtherance of *double-breasted operations,* which, by definition, include the use of both union and non-union firms, not the exclusion of either.

B. The Clayton and Norris-LaGuardia Acts have been judicially construed to immunize from the antitrust laws acts taken in furtherance of the interests of either party to a labor dispute, except that management and labor may not conspire to create a monopoly or a sheltered market or to impose other direct restraints on competition. But with those exceptions, both unions and employers are entitled to the benefit of the statutory exemption. That exemption should be applied here. Because the complaint here alleges no conspiracy designed to create a monopoly, shelter a market, or impose other direct restraints on commercial competition, but rather alleges only acts in furtherance of the interests of one party to a labor dispute, the statutory exemption requires a dismissal of the complaint.

C. A qualified non-statutory exemption also applies to the acts of both labor and management if their acts are consistent with the goals of federal labor policy and if they do not joi[illegible]nds to impose direct restraints on competi[illegible]ts' furtherance of double-breasted o[illegible] with a significant goal of federal [illegible]edom of employees both to join [illegible] from joining unions. The complaint here fails to allege that the Employer-Defendants, either alone or in combination with any unions, acted to exclude any class of competitors from the market or otherwise to impose any direct restraint on competition, as did the defendants in *Connell*. They are, therefore, entitled to the non-statutory exemption.

D. The furtherance of double-breasted operations actually encourages competition rather than suppresses it. Any restraint on the business of unions or of exclusively unionized contractors is a restraint brought about because of competition. It is in fact the Plaintiff-Unions who seek to preserve a sheltered market for unionized employers and employees. This Court surely should not permit Plaintiffs to use antitrust litigation to achieve a monopolistic end.

ARGUMENT

I. The Allegations of the Complaint Do Not Present the Obverse of the Situation Described in Connell

The Court of Appeals' opinion concluded that the allegations of Plaintiff's complaint "present virtually the obverse of the situation described in *Connell.*"[1]

This is simply not true.

In *Connell,* this Court was dealing with a specific written agreement by which the contractor and the Union agreed that the contractor would subcontract "*only* to firms that are parties to an executed, current collective bargaining agreement with Local 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry." 421 U.S. at 620 (Emphasis supplied).

In the instant case, no paragraph of the complaint alleges any agreement or any conspiracy to contract or subcontract *only* to non-union contractors or subcontractors. Nor does the complaint allege an agreement or conspiracy to exclude union contractors or any other class of contractors or subcontractors from the market.

The Court of Appeals, with some justification, criticized the District Court for incorrectly characterizing the complaint.[2] But the Court of Appeals has committed the same *genre* of error. For the Court of Appeals erroneously states that the complaint alleges that "members of the

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[1] *Connell Construction Co.* v. *Plumbers and Steamfitters Local 100,* 421 U.S. 616 (1975).

[2] The District Court had read the complaint as alleging that defendants had declined to enter into agreements to deal only with union contract signatories.

AGCC coerced and aided each other to subcontract *only* with subcontractors who had not signed with the Union" (App. A[3], p. 13) and to "hire *only* construction firms, primarily subcontractors, who had not signed with the Union" (App. A, p. 18). It also erred when it characterized the complaint as alleging a "conspiracy of employers to destroy a particular union through a *boycott* of union signatory subcontractors (App. A, p. 39); again when it characterized the complaint as alleging a "conspiracy to establish an industry-wide boycott against all subcontractors with whom the Unions had signed agreements" (App. A, p. 47); again when it referred to this case as involving "a conspiracy to injure the union by eliminating companies that employ the union's members from the service market" (App. A, p. 52); and yet again when it referred to the complaint as alleging "that defendants conspired to boycott subcontractors who signed with the plaintiff Unions" (App. A, p. 66).

The fact is that there is no paragraph in the complaint which alleges such a boycott, which alleges a conspiracy to eliminate union subcontractors, or which alleges an agreement or conspiracy to deal *only* or *exclusively* with non-union contractors.[4]

The absence of any such exclusionary allegations in the complaint was no accident of inartistic pleading. The complaint was intended to, and did, allege in Paragraph XXIV, Subparagraph (2), that Defendants created and maintained

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[3] References herein to Appendices, abbreviated "App." are to the Appendices to the Petition for Certiorari filed by the Associated General Contractors of California, Inc., in the instant case.

[4] Because of the seeming judicial confusion as to what this complaint does allege, we have included as an attachment to this brief (pp. A. 1-3, *infra*) the full text of the paragraphs which appear to constitute the anti-trust count of the complaint.

"*double-breasted* contracting situations, in which contractors have established and maintained union *and* non-union divisions, departments, and/or other such entities" (emphasis supplied). It also alleged, in previous Paragraphs V and VIII that Defendants are parties to collective bargaining agreements with the Plaintiffs in the carpentry, drywall, and pile-driving industries.

These paragraphs make obvious that the Court of Appeals misread and misconstrued the complaint. For it is absurd to read into the complaint an allegation that Defendants intended to *exclude* the entire class of union contractors from the market, while at the same time alleging that Defendants themselves were parties to union agreements and were establishing and maintaining operations which included *both union and non-union* divisions, departments, and other such entities. Obviously, Plaintiffs are not alleging that Defendants intended to exclude their own union entities from the market.

Subparagraph (6) of Paragraph XXIV once again makes clear that the complaint is not alleging that Defendants were inspiring a boycott of all union firms, nor that Defendants sought to exclude all union firms from the market. For that Subparagraph alleges *not* that members and non-members were being influenced by Defendants to utilize *solely* non-union subcontractors to the *exclusion* of union contractors. Rather, it alleges that Defendants induced, encouraged, coerced, and aided members and non-members to "maintain non-union shops, *double-breasted* operations . . ." (emphasis supplied).

Subparagraphs (3), (4), and (5) of Paragraph XXIV cannot be read in isolation so as to allege an attempted exclusion of union contractors and/or subcontractors from the market. Those paragraphs do allege activities by Defendants designed to influence members and non-members to "refuse to enter into collective bargaining relationships with Plaintiffs," "to hire contractors and subcontractors who are not signatories to collective bargaining agreements with Plaintiffs," and "to enter into subcontracting agreements with subcontractors who are not signatories to any collective bargaining agreement with Plaintiffs." But when taken in context and read in light of the preceding Paragraphs and the accompanying Subparagraphs (2) and (6), it is crystal clear that the complaint alleges that Defendants engaged in such activity in furtherance of *double-breasted* operations, not *exclusively non-union* operations!

In *Connell,* the complaint alleged and the court found an agreement whose principal alleged feature *was* exclusivity. It was that agreed-upon *exclusion* of an entire class of non-union competitors from the market which this Court found to be a direct restraint of trade in contravention of the anti-trust laws.[5] The complaint here instead alleges activities specifically designed to *include* in the market both union and non-union contractors and subcontractors.

Such allegations are the very antithesis of *Connell,* not its obverse or "flip-side."

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[5] The lower courts have recognized the importance of this exclusionary agreement in *Connell.* In granting a motion to dismiss a complaint brought by another Carpenters' union against a group of employers in New Orleans, *Carpenters Local, Etc.* v. *Pratt-Farnsworth,* 511 F.Supp. 509 (E.D. La. 1981), the Court found *Connell* inapplicable, saying at page 518: "The Court has not been presented with any outside agreement containing the *exclusionary* measures found to restrain competition in *Connell.*" (Emphasis supplied.)

II. The Complaint Should Be Dismissed Because It Alleges Facts Constituting a Labor Dispute to which the Clayton-Norris-LaGuardia Statutory Exemption Applies

Paragraph XXV of Plaintiffs' complaint (pp. 20-21, App. E to the Petition for Certiorari) alleges that the alleged activities of Defendants (inducement, encouragement, aid, and coercion of persons to engage in and maintain double-breasted operations):

> (1) were "an unlawful interference and restraint of the business activities" of the Plaintiff-Unions;
>
> (2) were designed to "weaken, destroy, and restrain the trade of certain contractors who have faithfully performed the terms and conditions set out in the master collective bargaining agreements" to which Plaintiff-Unions are parties; and
>
> (3) created a "restraint of trade" the effect of which was "to further weaken and destroy" the Plaintiff-Unions "in their contractual relationship and in their ability to act according to their purposes and charters."

Stripped of legal jargon, what these allegations mean is that Plaintiff-Unions are strongly opposed to the development of double-breasted operations, for fear they will be weakened as unions and that the business of the all-union contractors will be hurt by the increased entry into the market of some non-union contractors and subcontractors.

But those concerns of the unions merely spell out a labor dispute of a classic variety. Plaintiff-Unions wish to remain strong and unhampered by the possibility of losing members or potential members because non-union employees, if Defendants are successful, will be able to find jobs in the construction industry. Their concerns are no doubt real.

It is common knowledge that unions today are losing members and losing many NLRB elections.[6] With the entry of non-union contractors and subcontractors into the construction industry, construction unions are no doubt concerned that they may experience similar losses of members and losses of elections in an industry which, until recently, has been a stronghold—indeed, a near monopoly —of organized labor.

The Plaintiff-Unions are no doubt also particularly concerned that a trade association of contractors whose members have traditionally operated with union contracts and who have customarily dealt exclusively with all-union contractors and subcontractors, is now actively encouraging double-breasted operations. But the Plaintiff-Unions' dislike of that development is a "labor dispute"—no more, no less.

The federal judiciary has been prohibited by the Norris-LaGuardia and Clayton Acts from intervening in such labor disputes at the behest of either party. The Court below was simply wrong when it held that the statutory exemption of labor disputes from the antitrust laws may be invoked only by unions and not by employers.

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[6] The Bureau of Labor Statistics reports that union membership dropped to 20.9% of the labor force in 1980 from 24.7% ten years earlier. *Monthly Labor Review,* January 1982, p. 26. The National Labor Relations Board, in its most recent Annual Report, stated that in fiscal year 1980, unions won only 45.7% of the representation elections conducted by that agency. This compares with 60.2% wins by unions in 1965. *National Labor Relations Board Annual Report for the Fiscal Year Ended September 30, 1980,* p. 16, and *National Labor Relations Board Annual Report for the Fiscal Year Ended June 30, 1965,* Table 13.

Section 20 of the Clayton Act, 29 U.S.C. §52, prohibits the federal courts from granting restraining orders or injunctions "in any case between an employer and employees . . . growing out of a dispute concerning terms or conditions of employment unless necessary to prevent irreparable injury to property, or to a property right, of the person making the application, for which injury there is no adequate remedy at law. . ."

In debate on this provision, Senator Thomas said on August 27, 1914:

> "I have heard this section spoken of as class legislation. If it were class legislation, it would be open, perhaps, to a great many objections; but I am unable to perceive that it is class legislation at all, as it would be if it were confined to and designed for the benefit of some specific portion of the community or some specific organizations of the community.
>
> "It seems to me that as drawn this section in its operation may result in defeating the purpose of the entire bill. If we turn to the first section, we find the word 'person' construed as embracing 'corporation.' Wherever the word 'person' occurs in the bill I think it may be safely assumed, because of the definition on page 2, that it includes corporations and associations. Hence the words 'person or persons' on the fourth line of page 27 mean corporations or associations as well as individuals, and the paragraph gives to these artificial persons the same rights, the same exemptions, the same authority, that are conferred upon individuals.
>
> "Let us see:
>
>> "And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment—

> "The corporation therefore has the same authority as the individual under this clause to terminate relations of employment—
>
> > "from recommending, advising, or persuading others by peaceable means so to do—
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> "The corporation has the same authority as the individual to cease to perform work or labor and to recommend, advise, or persuade others by peaceable means to do so—
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> > "or from peacefully persuading any person to work or to abstain from working—
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> "The Corporation has the same authority as the individual to exercise that authority without any danger of the restraining processes of injunction—
>
> > "from withholding their patronage from any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do—
>
> "And so forth.
>
> "Mr. President, under this provision as it is drawn there is just as much power given to the corporation lawfully to discriminate against the organization as is given to the organization lawfully to discriminate against a particular employer or employee, and of course that involves the idea and the possibility of combination."

51 Cong. Rec. 14333 (1914).

The Norris-LaGuardia Act broadened the scope of the Clayton Act's prohibitions against judicial intervention in labor disputes. The legislative history of the Norris-LaGuardia Act demonstrates that it, too, was not aimed at removing judicial restraints solely from *union* conduct during labor disputes. The report of the Senate Committee on the Judiciary (S.Rep. No. 163, 72nd Congress, 1st Sess. 19 (1932) said:

> "Moreover it will be observed that this Section (§6), as do most all of the other prohibitive sections of the bill, applies both to organizations of labor and organi-

> zations of capital. The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees."

And in debate, Senator Norris said (75 Cong. Rec. 4507 (1932)):

> "Wherever it can be done this bill applies equally to organizations of labor and organizations of capital."

Again, at p. 4509, Senator Norris said of the bill:

> "It attempts to weigh in the scales of justice all of the elements which ought to be considered in passing upon controversy between labor and capital. It asks for the laboring man nothing that it does not concede to the corporation."

Thus both the Clayton Act and the Norris-LaGuardia Act prohibit the use of injunctions in labor disputes, whether those injunctions are sought by unions or employers. And this Court has made clear in *United States* v. *Hutcheson,* 312 U.S. 219 (1941) that actions which are immune from injunction under either the Norris-LaGuardia or the Clayton Act are also immune from treble damage suits and criminal prosecutions under the antitrust laws, 312 U.S. at 234, 235. That immunization should and does extend to both employer and union conduct. We have found no cases in which this Court has specifically so held. But a number of lower courts have had no doubt on this score.

In granting a defendant-employer's motion to dismiss an antitrust action brought by a union—*Plumbers and Steamfitters Local 598* v. *Morris,* 511 F.Supp. 1298, 1311 (E.D. Wash. 1981)—Judge Quackenbush said:

> "It is clear this case grows out of a labor dispute as defined in the Norris-LaGuardia Act, 29 U.S.C. § 113. That Act removes the jurisdiction of the Court to issue an injunction in such a case. 29 U.S.C. § 104. Defendants use of economic power to bring pressure upon the union to affect collective bargaining nego-

> tiations raises the special policy concerns expressed in the Act. 29 U.S.C. § 107. The employers can assert this statutory protection and did so. See, *Amalgamated Transit Union* v. *Greyhound*, 529 F.2d 1073, 1078 (9th Cir. 1976); *Clune* v. *Publishers Ass'n*, 214 F.Supp. 520 (S.D.N.Y. 1963), aff'd, 314 F.2d 343 (2nd Cir. 1963); *Detroit News* v. *Detroit Typo*, 471 F.2d 872, 876-77 (6th Cir. 1972). See also, 75 Cong. Rec. 4507 (1932).

In the *Clune* case cited in the above quotation, the District Court said:

> "Section 20 of the Clayton Act (29 U.S.C. § 52) and the Norris-LaGuardia Act (29 U.S.C. §§ 53, 104, 113) apply to injunctions sought against employers as well as to injunctions sought against employees or labor unions."

See also Kennedy v. *Long Island Rail Road Company*, 319 F.2d 366, 373 (2nd Cir. 1963), where the Court relied in part on the Clayton Act's statement that "The labor of a human being is not a commodity or article of commerce" in finding an agreement of a group of employers for a strike insurance plan not be in violation of the antitrust laws.

Contrary to the opinion of the Court of Appeals, the acts against which the Plaintiffs here seek relief are among those specifically enumerated in both the Clayton and Norris-LaGuardia Acts as being free from judicial prohibition. Thus, to the extent that the complaint here alleges that Defendants are encouraging contracts with both union and non-union subcontractors and thus withholding patronage from some all-union contractors, or doing business in such a way as to decrease the union dues paid by all-union contractors to Plaintiffs, the acts complained of fall within both the Norris-LaGuardia Act's and the Clayton Act's prohibitions against enjoining "withholding from any person engaged in such [labor] dispute any strike benefits or *other moneys or things of value.*" (Emphasis added.)

And to the extent that the complaint alleges acts which cause any contractor to employ non-union labor rather than union labor, it encounters the Clayton Act's prohibition against enjoining "any person or persons"--which, we submit, includes contractors—"from terminating any relation of employment." Further, to the extent that Defendants are alleged to be encouraging the use of some non-union, rather than all union, subcontractors, it also encounters the Clayton Act's prohibition against enjoining any person from "ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do."

Thus the holding of the Court of Appeals in the instant case that employers are not entitled to the labor dispute statutory exemptions from the antitrust laws is contrary to the terms of the Clayton and Norris-LaGuardia Acts, as demonstrated both by the legislative history of those Acts and by judicial construction. Furthermore, contrary to the opinion of the Court below, the decision of this Court in *Allen Bradley* v. *Local 3, IBEW,* 325 U.S. 979 (1945) does *not* hold that the statutory exemption is not available to employers. *Allen Bradley* merely held that:

> "Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services."

325 U.S. at 808. As Professor Bernard D. Meltzer put it in his excellent article, "Labor Unions, Collective Bargaining and the Antitrust Laws," 32 Chicago L. Rev. 659 (1965), in summarizing the impact of *Allen Bradley:*

> "The Sherman Act applies to union-employer combinations that institute market restrictions essentially

> similar to those devised by businessmen even when they are free from union pressure. Accordingly, such restrictions are not exempted from the Act on the ground that they were thrust on resistant employers by a union pursuing its own interests by conferring monopoly benefits on an employer combination."

In *Connell*, this Court held that when unions and employers combine to create monopoly benefits, the matter has gone beyond the scope of permissible activities. The parties in *Connell* had specifically agreed to exclude an entire class of competitors from the market and had also, by a combination of the multi-employer agreement between Local 100 and the Association and the "most favored nation" clause in that agreement, created a sheltered market. As the Court said in *Connell* at p. 624:

> "The Union thus had complete control over subcontract work offered by general contractors that had signed these agreements. Such control could result in significant adverse effects on the market and on consumers—effects *unrelated to the Union's legitimate goals of organizing workers and standardizing working conditions*." (Emphasis supplied.)

But here there is no allegation of an attempt by the employers, either alone or in combination with a union, to seek either to create a business monopoly or to control the marketing of goods and services. Here there is alleged only a labor dispute about Defendants' furtherance of, and Plaintiffs' opposition to, double-breasted operations, wherein Defendants' actions are alleged to threaten the strength of the Plaintiff-Unions. While the activities of either companies or unions engaged in such a dispute may restrain trade, just as a strike or a lockout in a typical labor dispute may restrain trade, they do not run afoul of the antitrust laws unless they take the form of a jointly imposed direct restraint on competition, as in *Connell.*[7]

In summary, then, the Clayton and Norris-LaGuardia Acts, as construed by this Court in *Hutcheson,* have removed such classic labor disputes from the purview of the federal courts insofar as actions brought under the antitrust laws are concerned. Members of either organizations of capital or organizations of labor may lawfully combine to achieve their respective objectives in such disputes without running afoul of the antitrust laws' prohibitions against combinations which unreasonably restrain trade. Only when employers and unions, under the guise of resolving a labor dispute, conspire to create a sheltered or monopolistic market or to engage in other direct restraints on commercial competition, is this statutory exemption inapplicable. The statutory exemption requires a dismissal of the instant complaint.

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[7] Without even referring to the labor dispute exemptions of the Clayton Act, this Court made clear, back in 1924, that a classic dispute of this nature is not one with which the antitrust laws concern themselves. In *Industrial Assn.* v. *United States,* 268 U.S. 64, 76 (1925), the Court said:

> "With the conflict between the policy of the 'closed shop' and that of an 'open shop,' or with the 'American plan,' *per se,* we have nothing to do."

This case and its progeny [such as *United Leather Workers* v. *Herkert,* 265 U.S. 257, 271 (1923) and *Levering & G. Co.* v. *Morrin,* 289 U.S. 103 (1933)] appear to hold that even without regard to the Clayton and Norris-LaGuardia Acts' labor dispute exemptions, the incidental restraints on interstate commerce growing out of labor disputes do not, in the absence of special allegations of direct restraints, rise to the level of Sherman Act violations. In describing and distinguishing these and other such cases, in *U.S.* v. *Frankfort Distilleries,* 324 U.S. 293, 297 (1948), this Court said:

> "All involved the application of the Anti-Trust laws to combinations of businessmen or workers in labor disputes, and not to interstate commercial transactions. On the other hand, the sole ultimate object of respondents' combination in the instant case was price fixing or price maintenance."

The foregoing authorities were also referred to with approval in *Mandeville Farms* v. *Sugar Co.,* 334 U.S. 219, 234 n. 14 (1947). To the same effect see *Prepmore Apparel, Inc.* v. *Amalgamated Clothing Workers of America,* 431 F.2d 1004 (5th Cir. 1970). Thus, this line of cases offers an independent ground for dismissing the instant complaint, which does not allege any restraint of interstate commerce objectives other than those purely incidental to the labor dispute in which plaintiffs and defendants are alleged to be involved.

III. The Non-Statutory Exemption Also Applies Here in Light of Federal Labor Policy Recognizing Employees' Rights Both to Join and to Refrain from Joining Unions

As this Court well knows, there is also a limited nonstatutory exemption from antitrust laws which is invoked by the courts when necessary to reach a proper accommodation between Congressional policies under the NLRA and Congressional policy favoring free competition in business markets. This was described in *Connell,* 421 U.S. at 622, as:

> "a proper accommodation between the Congressional policy favoring collective bargaining under the NLRA and the Congressional policy favoring free competition in business markets."

That shorthand description was, however, a somewhat too narrow description of federal labor policy under the NLRA. Congressional policy under the NLRA has more than one facet. It is *not* limited to a policy "favoring collective bargaining." The declaration of policy in Section 1 of the National Labor Relations Act, speaks of eliminating obstructions to the free flow of commerce both:

> "by encouraging the practice and procedure of collective bargaining *and by protecting the exercise by workers of full freedom of association, self-organization, designation of representatives of their own choosing* * * *" (Emphasis supplied.)

That same freedom was also part of the federal labor policy underlying Section 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102, which states that an employee both "should be free to decline to associate with his fellows" and "have full freedom of association, self organization, and designation of representatives of his own choosing . . ." That same dual freedom (to join in union activity or to decline to do so) was also emphasized by the 1947 amendments to the National Labor Relations Act. Section 7 of that Act, 29 U.S.C. § 157, guarantees not only the right of employees to self-organization and to bargain collectively, but also:

> "the right to *refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment is authorized in Section 8(a)(3)." (Emphasis supplied.)

The advent of double-breasted operations, which Defendants here are alleged to be advocating, encouraging, inducing, coercing, and aiding, has made that guaranteed freedom a reality in the construction trades. As we have noted, the concept of double-breasted operations is that there will be both union and non-union operations in this industry, and that the same employer may, under certain conditions, have both a union and a non-union arm.

If, under federal labor policy, employees are to be free to refrain from engaging in union activity, that freedom can be meaningful only if employees who choose to refrain from union membership and support have an opportunity to earn a livelihood. To the extent that the construction industry has been monopolized or substantially dominated by unionized contractors, the plumber or the carpenter who has chosen not to join a union has had little opportunity to exercise his statutory freedom. For if he wanted a job, he had to work in a union setting.

The advent of double-breasted operations gave non-union employees their first chance, in many areas of this country, to find employment in the construction industry. According to a June 19, 1978, article in the *Washington Post*, §1, at 1 non-union construction, which began in the South, had, by 1978, spread to California. That article said:

> "Similarly, non-union construction has spread out of its home base in the South to union strongholds in the Far West where industry sources estimated that open-shop work on projects exceeding $250,000 jumped from 16% to 21% over the past year. It was not by coincidence that the AFL-CIO construction unions chose Los Angeles to kick off its new drive to build up membership and meet the competition head-on."

Later in the article the following paragraph appears:

> "Some industry representatives joined the Associated Builders and Contractors' John Trimmer in asserting that 'the virtual control of the industry by unions has been broken' but few if any will argue that George Meany's plumbers should be put on the endangered species list."

The reasons for the opening of the door to non-union contractors was apparently not an ideological one, but rather one compelled by the forces of competition. The article from which we have been quoting states that unemployment in the construction industry, as a whole, hit a high of 22.2% in May of 1975, which meant that nearly one out of every four workers in construction was unemployed. And, as the article says, "With the whole industry hurting, more and more work went to those who could do it cheapest and quickest: The so-called 'open shop' employer who didn't have to use union workers and who thus had no worry about strikes, work rules, inflexible job classifications, or union scale pay."

Union officials did not like what was happening, but recognized it as a fact of life. Again quoting from the *Washington Post* article:

> " 'The price of everything was going up—money, materials, supplies, design, environmental standards and litigation over them,' said Robert A. Georgine, head of the AFL-CIO's Building and Construction Trades Department. 'They couldn't cut costs there, so they cut the only costs they could control: the price of labor.'
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> "In other words, they went non-union, often into so-called 'double-breasted' operations, with a spin-off non-union company to bid for work that the union company could not get."

The utilization of such double-breasted operations has, under appropriate circumstances, received the sanction of the National Labor Relations Board, as being in accord with federal labor policy.

In *A-1 Fire Protection, Inc.,* 233 NLRB 38, 39 (1977), *remanded* 600 F.2d 918 (D.C. Cir. 1979); *clarified and reaffirmed,* 250 NLRB 217 (1980), the Board said:

> "But the Supreme Court recently held in *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers, AFL-CIO,* 425 U.S. 800 (1976), that a finding that two affiliated companies constitute a single employer does not require that a collective bargaining agreement with one of the companies be extended to the employees of the other and does not imply that the employees of each of the two companies do not compromise separate appropriate bargaining units. 425 U.S. at 805. In *South Prairie,* as here, one company had a union contract and the other company, to enable it to compete with nonunion contractors, did not.
>
> "The Board has recognized that in the construction industry a common owner may have one company to perform contracts under union conditions and another to operate under nonunion conditions and, even though they constitute a single employer, has refused to include the nonunion company employees in the same bargaining unit with those of the union company. *Central New Mexico Chapter, National Electrical Contractors Association, Inc., et al,* 152 NLRB 1604 (1965)."

In other circumstances, however, so-called double-breasted operations have been found to be a sham to cover violations of federal labor policy. Whether double-breasted operations are truly conducted separately and autonomously or whether an employer is merely donning a disguise to deceive the Union and circumvent obligations under an existing labor contract, is a matter which the Labor Board and the courts have examined on a case-by-case basis with considerable care.

This Court may remember the case of *South Prairie Construction Co.* (Peter Kiewit) v. *Local 627, International Union of Operating Engineers, AFL-CIO,* 425 U.S. 800 (1976), in which the Board, the Court of Appeals, and ultimately this Court dealt with some of the legal issues posed by double-breasted operations, such as whether there are, in truth, two employers, or but a single employer; and, even if there is only one employer, whether its two operations should be regarded as two separate bargaining units. While, upon remand in that case, the Board found two separate units (231 NLRB 76 [1977])[8] and thus a genuine double-breasted operation, it does not so find under other circumstances.

Note the following discussion in *Appalachian Construction, Inc.*, 235 NLRB 685, 686 (1978):

> "The Administrative Law Judge found that *Kiewit* held that in a double-breasted operation the employer need apply a collective-bargaining agreement covering an organized subsidiary to an unorganized subsidiary only if the employees of both subsidiaries formed a single appropriate bargaining unit. However, we are not faced with a 'double-breasted' operation: two companies operating in different economic climates, one union and one nonunion. There were no parallel and simultaneous operations. This was not an 'arm's-length' subcontracting arrangement . . . The subcontact was nothing more than an attempt to deceive the Union and thereby circumvent their obligations under the labor agreement. Appalachian and SE-OZ were a single integrated employer, and their employees constituted a single appropriate unit."

To the same effect, *see Harrill Electric Contractors, Inc.*, 258 NLRB No. 139 (1981). Thus the use of double-breasted operations is carefully policed by the National Labor Relations Board, and if there are abuses in its utilization, they can be and are corrected by the administrative agency primarily charged with administering federal labor policy.

---

[8] *Aff'd.* 595 F.2d 844 (D.C. Cir. 1979).

Within the proper limits of federal labor law, the true double-breasted operation offers an economically viable alternative for employees who wish to exercise their statutory right of refraining from union membership and activity. It also offers a viable economic opportunity for construction industry employers to meet non-union competition in geographic and/or functionally specialized areas in which it becomes important to do so. It is a means, as the NLRB put it, for an enterprise to have "two companies operating in different economic climates, one union and one non-union."

This Court, in *Connell,* noted the need to reach a proper accommodation between a Congressional policy, as implemented primarily by the NLRA, and the Congressional policy, primarily administered by the courts, favoring free competition in business markets.

We understand the non-statutory exemption to mean that some restraint of interstate commerce is permissible if it is incidental to acts of the parties taken in their own interest, but consistent with the goals of federal labor policy. The lower courts have applied this non-statutory exemption to both unions and employers. In *Amalgamated Meat Cutters* v. *Wetterau Foods,* 597 F.2d 133 (8th Cir. 1979), for example, an agreement between employers for the loan of employees to serve as temporary strike replacements was found consistent with the right of employers to replace economic strikers (*see NLRB* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333 [1938]), and thus its restraint on the Union "in terms of attracting membership and representing employees" was a restraint which "directly flows from the sanctioned conduct," had no unrelated anticompetitive effect, and was therefore not violative of the antitrust laws.

The Supreme Court has not, so far as our research reveals, passed squarely on the issue of whether the nonstatutory exemption is applicable to employers as well as unions. Justice Harlan, however, in a concurring opinion in *Volkwagenwerk* v. *FMC*, 390 U.S. 261, 287 n. 5 (1967), surely implied that it is when he said:

> "In *Mine Workers* the Court said, 'We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws. . . .' 381 U.S., at 664. It seems equally obvious that the employers are not violating the antitrust laws either when they confer about wage policy preparatory to bargaining or when they sign an agreement."

There seems no valid reason not to make the exemption applicable to both employers and unions. The same policy reasons are present. Unions and employers and individual employees all have rights under the federal labor laws. They should all be free to exercise those rights, and restraints of trade should be tolerated so long as they are merely incidental to the exercise of those rights, and do not cross the line into direct restraints such as the monopolization and sheltered market areas referred to in *Connell*. In this respect, both the statutory and nonstatutory exemptions are, and should be, parallel.

Our understanding of the law in this regard was well documented by Judge Yankwich in *United States* v. *San Francisco Electrical Contractors Ass'n*, 57 F.Supp. 57, 62-63 (N.D.Cal. 1944):

> "We advert briefly to the immunity which attaches to certain activities of employers and employees, working separately or in concert. Acts of employers seeking control of a trade through the open shop (Industrial Ass'n of San Francisco v. United States, 1925, 268 U.S. 64, 45 S. Ct. 403, 69 L.Ed. 849) or of em-

ployes to achieve a like control through the closed shop (United Leather Workers' International Union v. Herkert & Meisel Trunk Co., 1924, 265 U.S. 457, 44 S.Ct. 623, 68 L.Ed. 1104, 33 A.L.R. 566; Levering & Garrigues Co. v. Morrin, 1933, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062), or other indirectly restrictive practices of employers (Anderson v. United States, 1898, 171 U.S. 604, 19 S.Ct. 50, 43 L.Ed. 300), or unions (Apex Hosiery Co. v. Leader, 1940, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311, 128 A.L.R. 1044; United States v. Hutcheson, et al., 1940, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788; United States v. American Federation of Musicians, D.C.Ill. 1942, 47 F.Supp. 304), including prevention of use of machines and appliances originating in interstate commerce (United States v. Carrozzo, 1941, D.C.Ill., 37 F.Supp. 191; United States v. Bay Area Painters, etc., Joint Committee, D.C.N.D.Cal. 1943, 49 F.Supp. 733, per St. Sure, J.) are immunized by the impact of the Clayton and Norris-LaGuardia Acts on the Sherman Anti-Trust law, or by judicial decisions preceding or following the enactment of the first named acts.

"However, boycotts, or other discriminatory practices, such as stoppages or direct agreements not to work on equipment or materials originating outside of the state, or to give preference to local products are not immune. United States v. Heating Piping & Air Conditioning Contractors Ass'n, D.C.Cal., 1940, 33 F.Supp. 978; United States v. Local Union No. 3 of International Brotherhood of Electrical Workers et al., D.C.N.Y., 1941, 42 F.Supp. 783; United States v. New York Electrical Contractors Ass'n, D.C.N.Y., 1941, 42 F.Supp. 789.

"Our own Circuit Court of Appeals in Lumber Products Ass'n, Inc., v. United States, 9 Cir., 144 F.2d 545, has applied these norms to a combination between labor unions and employers, the object of which was *not* to regulate conditions of labor which might incidentally affect commerce indirectly, *but to monopo-*

> *lize interstate commerce.* So doing, the court drew the line strictly between the licit and illicit in contracts of this character."

The instant complaint alleges no direct restraint of competition nor any agreement to monopolize interstate commerce. Instead, it alleges actions in support of double-breasted operations. Those operations are consistent with the federally protected rights of employees to exercise a free choice to join or refrain from joining unions. They are also an exercise by the employers of their right under the NLRA to maintain such operations. There is no claim that the double-breasted operations being fostered here have been found by the NLRB to be in any way improper. Any restraint of commerce incidental to those actions which are consistent with federal labor policy goals do not constitute a violation of the Sherman Act. Rather, they fall within both the statutory exemptions and the non-statutory exemptions which have been defined and developed by the judiciary.

IV. Double-Breasting, in any Event, Is Not in Restraint of Competition, But in Furtherance of It.

It is difficult to see how the advent of double-breasted operations could be alleged to constitute a restraint on competition. For, virtually by definition, double-breasted operation is a means of furthering, not restraining competition. Unions may not welcome this added competition, nor, indeed, may certain contractors who wish to remain exclusively union in the traditional pattern of the industry. The language of this Court in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977) seems most appropriate here:

> "But the antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complaint that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for "the protection of *competition,* not *competitors,' Brown Shoe Co.* v. *United States,* 370 U.S., at 320. It is inimical to the purposes of these laws to award damages for the type of injury claimed here."

As in *Brunswick,* what the Unions seek here is increased concentration, while Defendants are encouraging and preserving competition. The Unions want to see the construction business concentrated in the hands of union concerns. As in *Brunswick,* the damages Plaintiffs seek are designed to provide them with revenues they would have realized (in the form of union dues) had competition been reduced and the business remained in the exclusive hands of unionized contractors.

The entry into the construction business of some non-union firms can only increase competition. Unions may be in some degree shielded from the anti-trust laws when they seek to restrain or even eliminate competition with respect to labor costs by organizing employees and withholding services during strikes. But they are not entitled to use the antitrust laws as a sword to restrain or eliminate competition. That is precisely what the complaint seeks to do here. It should, for that reason alone, be dismissed.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed and the complaint herein should be dismissed.

Respectfully submitted,

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APPENDIX

XXIII.

Since on or about April 1, 1974, and continuing to date, defendants and each of them have entered into a plan, scheme, agreement and conspiracy, knowingly, willfully and maliciously, whose purpose and ends are to abrogate, destroy, undermine, and weaken the collective bargaining relationship between plaintiffs and each of them and defendants and each of them, and between plaintiffs and other parties to the above described collective bargaining agreements; included within the other parties are the California Drywall Contractors Association and all "memorandum contractors" to the above described master collective bargaining agreements.

XXIV.

Pursuant to said plan, scheme, agreement and conspiracy, defendants and each of them have knowingly, willfully and maliciously committed the following acts:

(1) Changed names and corporate status without reason, and as a part of the above described plan, agreement, scheme, and conspiracy, in a fraudulent manner;

(2) Created and maintained double-breasted contracting situations, in which contractors have established and maintained union and non-union divisions, departments, and/or other such entities;

(3) Advocated, encouraged, induced, and aided nonmembers of defendant Associated General Contractors of California, Inc. to refuse to enter into collective bargaining relationships with plaintiffs and each of them;

(4) Advocated, encouraged, induced, coerced, aided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs and each of them;

(5) Advocated, induced, coerced, encouraged, and aided members of Associated General Contractors of California, Inc., non-members of Associated General Contractors of California, Inc., and "memorandum contractors" to enter into subcontracting agreements with subcontractors who are not signatories to any collective bargaining agreements with plaintiffs and each of them;

(6) Held open-shop meetings for members of defendant Associated General Contractors of California, Inc. and non-members, where said members and non-members were induced, encouraged, coerced, and aided to maintain non-union shops, double-breasted operations, and to do and complete all of the activities described herein. These non-members referred to in this subparagraph were both memorandum contractors and non-memorandum contractors.

(7) Breached the collective bargaining agreements between defendants and each of them and plaintiffs and each of them, by failing to pay agreed-upon wages, by failing to use the hiring hall, by failing to pay Trust Fund contributions, by failing to observe other terms and conditions of employment, and by generally weakening the good-faith requirement of the collective bargaining agreements.

XXV.

The purpose and effect of the above described activities, plan and conspiracy are oppressive, unreasonable, and illegal, and are in restraint of trade and an unlawful interference and restraint of the free exercise of the business activities of plaintiffs and each of them, all in violation of 15 U.S.C. Section 1. The purpose and effect of the above described activities, plan and conspiracy, in addition, are to weaken, destroy, and restrain the trade of certain contractors, both members of the Associated General Contractors of California, Inc. and non-members, who are "memorandum contractors," who have faithfully performed the terms and conditions set out in the master collective bargaining agreements described above. The effect of this restraint on trade is to further weaken and destroy plaintiffs in this matter. These activities are in restraint of the free exercise of plaintiffs' trade and an interference therein, all in violation of 15 U.S.C. Section 1.

XXVI.

Said actions are malicious and oppressive, in that they are designed to weaken and destroy plaintiffs and each of them and their local unions and District Councils in their contractual relationships and in their ability to act according to their purposes and charters.

Amicus Brief

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No. 81-334

IN THE

Supreme Court of the United States

October Term, 1981

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Petitioner,

vs.

CALIFORNIA STATE COUNCIL OF CARPENTERS and CARPENTERS 46 NORTHERN COUNTIES CONFERENCE BOARD, *et al.*,
Respondents.

BRIEF OF PACIFIC MARITIME ASSOCIATION AS AMICUS CURIAE.

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Respondents.

BRIEF OF PACIFIC MARITIME ASSOCIATION AS AMICUS CURIAE.

This brief *amicus curiae* in support of Petitioner is filed with the consent of all parties,[1] as provided in Rule 36 of the Rules of this Court.

Introduction and Statement of Interest.

The Pacific Maritime Association ("PMA") is an association of approximately 130 employers on the West Coast.[2] The PMA has for many years acted as a multi-employer association for the purpose of bargaining with the International Longshoremen and Warehousemen's Union ("ILWU").

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[1] Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] These employers include shipping lines, stevedoring companies and marine terminal companies. The shipping lines control the vessels which transport freight on the high seas; the marine terminals lease waterfront property and are responsible for the discharge of cargo; the stevedoring companies are retained by the marine terminal operators and are responsible for the actual loading and unloading of cargo. The terminal companies and stevedoring companies employ marine clerks and longshoremen which are represented by the International Longshoremen and Warehouseman's Union.

The concerns of PMA regarding the resolution of the issues accepted for review by this Court arise from the fact that PMA and certain of its members are defendants in an antitrust action which has been brought by the Western Conference of Teamsters in the United States District Court for the Central District of California pursuant to Sections 1 and 2 of the Sherman Act. The Teamsters' complaint is clearly designed to fall within the Ninth Circuit's decision to be reviewed by this Court.

The Teamsters' antitrust action grows out of a traditional labor dispute resulting from an organizational campaign launched by the Teamsters in an effort to unionize the employees of trucking companies who transport cargo to and from the waterfront. The Teamsters do not seek to organize the employees of PMA member companies who are already represented by the ILWU. The only connection between PMA and the Teamsters' organizational campaign is that the situs of the campaign, and hence the picketing of the non-union trucking companies, is located at the gates of PMA member terminals.

In the face of this organizational activity, PMA and its members have sought to exercise the same right to stay in business which would have been lawfully theirs in a primary labor dispute. They have resorted to the courts and to the National Labor Relations Board for injunctive relief and have been successful in those proceedings. The Teamsters allege in their complaint that these activities have blunted their organizational drive and are part of a conspiracy "with the objective of maintaining a non-union, substandard, depressed condition with respect to driver compensation." The Teamsters contend that they have stated a valid antitrust claim under the Ninth Circuit decision to be reviewed by this Court. By reason of that decision, PMA faces not only the potentially enormous costs of defending the Teamster action but the threat of additional antitrust litigation if its self-protective efforts have the effect of further impeding the Teamsters organization drive. If actions taken by neutral employers to protect themselves in a labor dispute brought to their premises constitute a violation of the antitrust laws, then the Ninth Circuit's decision becomes the harbinger of a new era of antitrust litigation and signals a sharp break with 50 years of precedent developed by the NLRB and this Court.

If in fact businesses conspire to boycott certain companies (whether based upon union status or other factors), those boycotted companies have a right to seek relief under the antitrust laws. However, simple allegations that certain conduct thwarts a union's efforts to organize non-union companies have never before been deemed to state an antitrust cause of action.

The PMA believes that the issues as to which certiorari has been granted are of broad significance to the future of multi-employer associations. Traditional labor disputes which have hitherto properly been resolved under the labor laws would, under the Ninth Circuit decision, be cast into the antitrust arena. The resolution of these issues will have a profound effect upon the ability of multi-employer groups to defend themselves under the federal labor laws when thrust into a labor dispute with a union which has no representational interest in their employees.

PMA submits this brief *amicus curiae* to assist the Court in assessing whether multi-employer groups whose members are neutrals caught up in a labor dispute should face the specter of antitrust liability.

Summary of Argument.

Since *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), this Court has recognized that federal antitrust and labor laws and policies frequently conflict and that the antitrust laws are to be applied only where there is some form of restraint upon commercial competition in the marketing of goods and services. No such allegations are present here, where the California State Council of Carpenters et al. (the "Union") asserts in substance a conspiracy among members of the Associated General Contractors ("AGC") to destroy the Union by refusing to deal with unionized subcontractors, thereby frustrating the Union's labor organizing, negotiating and other activities. Such alleged activities are comprehensively governed by the National Labor Relations Act with explicit, Congressionally chosen remedies.

No statute requires or permits application of antitrust laws here, because the Sherman, Clayton and Norris-LaGuardia Acts together confer a statutory exemption from the antitrust laws for the AGC's alleged activities. The Ninth Circuit erroneously limits the statutory exemption to "labor unions acting alone" because of the alleged "pro-labor purpose" of that exemption, 648 F.2d at 533-534, despite statutory language, legislative history and case law requiring that the statutory exemption extend to employer as well as to union activity under circumstances such as those in the present case.

The nonstatutory labor exemption also shields the AGC's alleged conduct. Following *Apex Hosiery*, lower courts have regularly dismissed antitrust claims which attempt to reach ordinary labor disputes where the parties' conduct is already regulated by the federal labor laws, and where there is no alleged restraint upon commercial competition in the market of goods and services in which those employers compete.

By electing to read the Union's allegations here as "very similar to a concerted refusal to deal," 648 F.2d at 531, the Ninth Circuit majority has failed to recognize this action as "a labor case wearing an antitrust costume," 648 F.2d at 543 (Sneed, J., dissenting), and has produced a result incompatible with this Court's approach in *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975).

The Union does not have standing to assert Sherman Act damage claims. The Ninth Circuit identified two different alleged injuries and incorrectly treated them as interchangeable: 1) Injury to the Union's business in organizing employees, negotiating agreements and the like; and 2) Injury to the Union resulting from the lost or diminished employment of employees of boycotted subcontractors.

Under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the injury to the Union's business does not flow from that which makes the alleged boycott illegal — restraint upon competition among subcontractors in the construction industry. The same result obtains under standing formulations such as the "target area" test. The Union seeks damages for injury to its business which, by definition, restrains competition, by complaining of restrained competition in an industry, construction, in which it does not compete.

The Union does not have standing to sue for injury resulting from the lost or diminished employment of the employees of the boycotted subcontractors under *Brunswick*, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and numerous lower court decisions. Employees whose loss of employment is derivative of the antitrust injury to their employers do not have standing. Nor can the Union bring suit on such alleged facts.

ARGUMENT.

I.

THE ALLEGED EMPLOYER GROUP CONDUCT IS NOT WITHIN THE AMBIT OF THE ANTITRUST LAWS.

As this Court has recognized since at least *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), the federal antitrust laws and federal labor laws are in fundamental and frequently irreconcilable conflict.[3] The Sherman Act condemns "every contract, combination . . . or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. By contrast, the purpose of the federal labor laws is the promotion of industrial peace and stability "by encouraging the practice and procedure of collective bargaining," 29 U.S.C. § 151, a natural consequence of which is the suppression of competition with respect to wages and working conditions.

This Court has also consistently recognized that the antithetical purposes of these two important federal policies can best be accommodated by declining to apply federal antitrust laws to ordinary labor disputes, either because of the statutory labor antitrust exemption enacted by Congress in Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105 and 113, or the nonstatutory exemption. The nonstatutory exemption has been judicially developed to achieve "a proper accommodation between the Congressional policy favoring collective bargaining under the NLRA and the Congressional policy favoring free competition in business markets. . . ." *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 621-22 (1975). See *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940):

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[3] *See, e.g., Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622 (1975) (goals of federal labor law never could be achieved if union success in eliminating competition over wages and working conditions with the consequential effect on price competition among employers were held to be a violation of the antitrust laws); *Commerce Tankers v. National Maritime Union of America*, 553 F.2d 793, 801 (2d Cir. 1977) (accommodation of the conflict between antitrust and labor policies is "a troublesome and unruly issue" raising "extremely complex and significant question on the interaction between the federal labor and antitrust laws"); St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603, 604 (1976) (antitrust and labor laws are "intrinsically incompatible").

> . . . [T]his Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless the Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods or services.

310 U.S. at 495. The Court also made clear in *Apex Hosiery* that the nonstatutory exemption of labor activities applied to "the activities of industry and labor alike." 310 U.S. at 512. Both the statutory and nonstatutory exemptions insulate the employer group conduct challenged in this action from antitrust scrutiny.

A. The Alleged Conduct Is Protected by the Statutory Exemption From the Antitrust Laws.

Section 20 of the Clayton Act, 29 U.S.C. § 52, removes certain conduct in the context of a labor dispute from the ambit of the antitrust laws. *United States v. Hutcheson*, 312 U.S. 219 (1941). Similarly, Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, narrows the permissible exercise of equitable powers of federal courts in labor disputes. In addition, Congress broadly defined "labor dispute" in Norris-LaGuardia Act § 13 to remove the federal district courts and federal antitrust law from the realm of ordinary "labor disputes." The Sherman, Clayton and Norris-LaGuardia Acts must be read as a "harmonizing text," *United States v. Hutcheson*, 312 U.S. at 231; activities protected by Clayton Act § 20 or Norris-LaGuardia Act § 4 are thus not subject to injunctive relief and further are not to be considered substantive violations of the antitrust laws. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603, 607 (1976).

Although the case law has focused primarily on the extent to which these statutes immunize labor union activity, certain *employer* conduct is also properly given statutory immunity. The statutory language itself carefully indicates that the statutory immunity covers both employers and employees,[4] and both the Clayton and Norris-LaGuardia Acts expressly protect activities that clearly can be engaged in by employers.[5]

The purpose of the Clayton and Norris-LaGuardia Acts is to allow employers and employees to pursue their own interests in labor disputes, without restraint from the antitrust laws. This application to both employers and employees is confirmed in the legislative history of the Norris-LaGuardia Act:

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[4] For example, § 20 of the Clayton Act, 29 U.S.C. § 52, expressly protects "any person or persons" engaging in the enumerated acts. Clayton Act § 1, 29 U.S.C. § 53, defines "person" to include "corporations and associations" wherever it is used in the Clayton Act's provisions. Similarly, although the Norris-LaGuardia Act does not define "person," that term in the acts of Congress is to be interpreted, unless the context indicates otherwise, to include "corporations, companies, associations, firms, partnerships, societies and joint stock companies." 1 U.S.C. § 1.

[5] For example, Norris-LaGuardia § 4 protects "[b]ecoming or remaining a member of any . . . employer organization." Other provisions of that section also apply to employers: "Ceasing . . . to remain in any relation of employment"; "Paying or giving to . . . any person participating or interested in [a] labor dispute, any . . . moneys or things of value"; "By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit"; "Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute"; "Advising or notifying any person of an intention to do any of the acts heretofore specified"; "Agreeing with other persons to do or not to do any of the acts heretofore specified"; and "Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . ." Clayton Act § 20 also protects certain specified employer conduct, whether undertaken "singly or in concert," such as "ceasing to employ any party to [a dispute concerning terms and conditions of employment]."

> Most all of the . . . prohibitive sections of the bill apply both to organizations of labor and organizations of capital. The same rule, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees.

Senate Report No. 163, 72d Cong., First Sess. (1932). See *Amalgamated Meat Cutters v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979).

Without acknowledging these longstanding limits on the application of the antitrust laws in labor disputes, the Ninth Circuit panel majority in the present case misconstrued the statutory exemption as applicable only to "anticompetitive conduct on the part of labor unions acting alone" because of its "pro-labor purpose." 648 F.2d at 533, 534. This interpretation fatally confuses an even-handed purpose favoring lawful collective bargaining between employers and duly recognized labor organizations with a one-sided "pro-labor" purpose. Such a one-sided purpose is inconsistent with the statutory language, congressional intent, and case law. *See, e.g., Kennedy v. Long Island Railroad Co.*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963); *Clune v. Publishers Association of New York City*, 214 F. Supp. 520 (S.D.N.Y.), *aff'd. mem.*, 314 F.2d 343 (2d Cir. 1963).

The decision below cannot be supported by analogy from the combination between a union and an employer or employer group condemned in *Allen Bradley Co. v. IBEW Local No. 3*, 325 U.S. 797 (1945). In *Allen Bradley*, the union combined with employers for purposes including price-fixing and market allocations designed to monopolize. Whether undertaken by the employers themselves or with the aid of the union, this conduct constituted a classic restraint on commercial competition in goods and services of the type the antitrust laws were designed to prevent.[6]

The alleged conduct in the present case is also unlike combinations of employers and "sham" unions designed to drive competing employers out of business. There, the statutory immunity also does not apply. See *International Association of Heat and Frost Insulators and Asbestos Workers v. United Contractors Association, Inc.*, 483 F.2d 384, 387 (3d Cir. 1973), *modified*, 494 F.2d 1353 (1974); *Carpenters District Council v. United Contractors Association of Ohio, Inc.*, 484 F.2d 119 (6th Cir. 1973), *modified*, 539 F.2d 1092 (1976), where in each case the union plaintiffs were allowed to maintain antitrust actions on allegations that the employer and a rival or sham union had combined to obtain a competitive advantage in commercial markets over other employers who were parties to labor contracts with the plaintiff union.

The allegations in the present case assert in substance a purported conspiracy to destroy the Union through a boycott of unionized subcontractors, thereby frustrating its organizational and other activities. Such alleged conduct is of course comprehensively regulated by the National Labor Relations Board and the courts pursuant to the unfair labor practice provisions of Section 8 of the National Labor Relations Act, 29 U.S.C. § 158. However, employer conduct which responds to a present or anticipated labor dispute and is not directed toward destroying or restraining competition with a commercial competitor does not constitute a violation of the antitrust laws. *See Prepmore Apparel, Inc. v. Amalgamated Clothing Workers of America*, 431 F.2d 1004 (5th Cir. 1970); *United Brick & Clay Workers v. Junction City Clay Co.*, 158 F.2d 552 (6th Cir. 1946). The Sherman Act is not "a panacea for all business affronts which seem to fit nowhere else." *Scranton Construction Co., Inc. v. Litton Industries Leasing Corp.*, 494 F.2d 778, 783 (5th Cir.), *cert. denied*, 419 U.S. 1105 (1974). Here, the Union has not alleged anticompetitive conduct between employers in commercial markets, and thus as a matter of law has not stated an antitrust claim.

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[6] *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) (nonstatutory exemption lost when union combined with employers with the purpose of eliminating competition in the commercial marketing of coal); *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94 (1962) (antitrust violation found when employers engage with a union, or use the guise of the union for the purpose of controlling prices or allocating the market for their goods); *cf. Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965) (nonstatutory exemption shields agreements between employers and unions relating to the elimination of competition over wages, hours and working conditions).

B. The Alleged Conduct Is Protected by the Nonstatutory Exemption From the Antitrust Laws.

The decision of this Court in *Apex Hosiery* established over 40 years ago that most concerted employer action in connection with labor disputes is not subject to antitrust scrutiny because of the absence of any "form of restraint upon commercial competition in the market of goods or services." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940).

Since *Apex Hosiery*, lower courts have assessed the legal sufficiency of antitrust allegations in a labor context by balancing the degree of interference with federal labor policy against the magnitude of the restraint of trade and whether the restraint directly or indirectly affects market prices and free competition for the consuming public. *Amalgamated Meat Cutters v. Wetterau, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979).

In the intervening 40 years since *Apex Hosiery*, lower courts have regularly dismissed antitrust claims which attempt to reach ordinary labor disputes, where the parties' conduct is already regulated by the federal labor laws and where there was no alleged anticompetitive restraint upon commercial competition in the market of goods and services in which those employers compete.

In *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004 (5th Cir. 1970), the court dismissed an antitrust claim by a union that Prepmore and two of its officers conspired with another company to injure and destroy the union by refusing to deal with the union. Relying on *Apex Hosiery*, the Fifth Circuit found no evidence of a conspiracy to restrain competition in the marketing of Prepmore's goods and thus no viable Sherman Act claim. The court also noted that the alleged conduct is ordinarily a violation of Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5).

In *Kennedy v. Long Island Railroad Co.*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963), the court held that a strike insurance plan among railroads did not violate the Sherman Act. The court pointed out that the antitrust laws "were not intended as instruments for the regulation of labor-management relations." 319 F.2d at 373. *See also Airline Pilots Association v. Civil Aeronautics Board*, 502 F.2d 453 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 972 (1975) (airlines' mutual aid pact for strikes upheld on reasoning of *Kennedy*).

Prior to the present case, the Ninth Circuit had also followed *Apex Hosiery* and applied the nonstatutory exemption to labor disputes. In *Schatte v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators*, 182 F.2d 158 (9th Cir. 1950), *cert. denied*, 340 U.S. 827 (1950), the court found no antitrust claim where a union alleged a conspiracy between a rival union and certain studios to violate labor contracts and to refuse to hire carpenters who worked under such agreements. Allegations that the defendants compelled competitors of the employer defendant to employ less efficient members of a rival union with the intent of driving his competitors out of business were held not to violate the antitrust laws on the basis of *Apex Hosiery*: "Compelling others to adopt certain employment policies is not a restraint upon commercial competition in [the *Apex Hosiery*] sense" 182 F.2d at 167. Courts across the nation have long followed the same approach.[7]

All the foregoing authorities reflect the consistent requirement that the antitrust plaintiff allege anticompetitive conduct as to commercial markets for goods and services in which the defendant employers compete. Contrary to this consistent requirement, the Ninth Circuit majority has now created a new antitrust doctrine of anticompetitive conduct reaching the alleged impact of employer activities on unions in their supposed "business" of organizing and representing employees. The Ninth Circuit panel majority in the present case elected to read the Union's allegations as "very similar to a concerted refusal to deal," 648 F.2d at 531, while recognizing that the alleged conduct "might also have provided a basis for unfair labor practice proceedings under §§ 8(a)(1) and 8(a)(3)." 648 F.2d at 532 n.6. Dissenting Judge Sneed is correct in his astute observation that the present action is "a labor case wearing an antitrust costume," 648 F.2d at 543, which is within the exclusive jurisdiction of the National Labor Relations Board. As Judge Sneed stated, the unions' "basic injury . . . is impairment of their ability to represent a greater portion of the workers in the construction industry," or injury to their "organizational and representational efforts," 648 F.2d at 542, and such injuries "must be redressed pursuant to the terms of the National Labor Relations Act." *Id.*

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[7] *United Brick & Clay Workers v. Junction City Clay Co.*, 158 F.2d 552 (6th Cir. 1946) (rejecting allegations by a national union against several parties, including several employers and an alleged strike-breaking concern, of a conspiracy to thwart its representational efforts); *Amalgamated Meat Cutters v. Wetterau, Inc.*, 597 F.2d 133 (8th Cir. 1979) (antitrust laws held inapplicable to alleged inter-employer loans of employees during a strike; antitrust laws "were not enacted to regulate labor relations," 597 F.2d at 135); *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*, 475 F. Supp. 482 (S.D.N.Y. 1979), *appeal dismissed as moot*, 638 F.2d 7 (2d Cir. 1980) (dismissing antitrust claims where Stevens allegedly conspired with others, impeded Union's activities as a union and damaged its ability to attract members in purported violation of the antitrust laws); *Carpenters Local No. 1846 v. Pratt-Farnsworth*, 511 F. Supp. 509 (E.D. La. 1981) (expressly disapproving the Ninth Circuit decision at issue here, and holding that allegations of collective bargaining obstruction and consequent injury to union functions and representation were labor disputes within the exclusive jurisdiction of the NLRB); *Clune v. Publishers Association of New York City*, 214 F. Supp. 520 (S.D.N.Y.), *aff'd. mem.*, 314 F.2d 343 (2d Cir. 1963) (holding that an employer group lockout was concerted action but did not form the basis for relief under the antitrust laws); *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298 (E.D. Wash. 1981) (holding that a multi-employer association and its members did not violate federal antitrust law by engaging in a lockout and other concerted activities).

Nothing in *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975), requires the drastic departure undertaken by the Ninth Circuit panel below. The misuse of antitrust allegations in disputes such as those here would permit the Union

> to achieve precisely what *Connell* prohibited. That is, employers with whom plaintiffs have no collective bargaining relationship will be eliminated from the relevant market with the resulting impairment of competition. This will come about not because of an agreement by employers with the plaintiffs of the type condemned by *Connell*, but because the now real threat of antitrust liability will divert virtually all subcontracting to employers having a collective bargaining relationship with the plaintiffs. Those with a taste for

> irony will no doubt savor the spectacle of *Connell* self-destructing.

648 F.2d at 541 (Sneed, J., dissenting).

C. Conclusion.

The effect of the Ninth Circuit's incorrect interpretation of *Connell* and its application to labor disputes arising from purported injury to a union's organizational and other activities will have repercussions far beyond the present case. As pointed out by Judge Sneed in dissent and in accordance with all relevant precedent, an action based on harm to a union's organizational and representational efforts is cognizable solely under the comprehensive regulatory scheme of the NLRA under the preemption principles enunciated by this Court in *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971) and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The antitrust laws provide no alternative or supplemental remedy in a collective bargaining dispute or in a dispute arising from defensive employer reactions to an organizational drive outside of the collective bargaining relationship. 648 F.2d at 542; *see also Amalgamated Meat Cutters v. Wetterau, Inc.*, 597 F.2d 133 (8th Cir. 1979); *Schatte v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators*, 182 F.2d 158 (9th Cir. 1950), *cert. denied*, 340 U.S. 827 (1950); *United Brick & Clay Workers v. Junction City Clay Co.*, 158 F.2d 552 (6th Cir. 1946); *Carpenters Local v. Pratt-Farnsworth*, 511 F. Supp. 509, 521-22 (E.D. La. 1981).

The Ninth Circuit majority ignores the profound transformation of federal labor policy which would be worked by superimposing draconian antitrust remedies on the existing specially designed remedial provisions of the National Labor Relations Act and by reintroducing into American labor-management relations, as an arbiter of ordinary labor disputes, the nation's federal district judges who have been precluded from that role since the reform efforts symbolized by the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105 and 113. Such was not the intent of Congress which carefully provided remedies for violations of Section 8, 29 U.S.C. § 158, vested the NLRB with wide enforcement powers, 29 U.S.C. § 160, and limited the remedies for unfair labor practices to losses actually suffered by victims. *Local 60, United Brotherhood of Carpenters v. N.L.R.B.*, 365 U.S. 651 (1965); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941); *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7 (1940). Such procedures, and not major antitrust litigation, are the Congressionally preferred tools for regulating labor-management relations in the United States.

II.

THE UNION HAS NO STANDING TO BRING AN ANTITRUST ACTION FOR TREBLE DAMAGES.

The Ninth Circuit characterizes the instant case as one involving a group boycott because the underlying complaint alleges that AGC and its members coerced owners of land and each other to contract or subcontract work only to subcontractors who had not signed agreements with the Union. An examination of the entities involved under this characterization is critical to an informed analysis of the standing issue. The AGC and its members ("A") are coercing landowners and themselves ("B")[8] to refrain from contracting with Union subcontractors ("C") which has the result of injuring the Union ("D") in its business.

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[8] The Ninth Circuit has failed to inquire into why the relationship between the landowners and the AGC gives the AGC economic leverage to "coerce" the landowners.

Also critical to analysis of the standing question is the injury or damage alleged to have been suffered by the Union. The Ninth Circuit has identified two completely different types of damage allegedly suffered as a result of the AGC's actions and has treated them as interchangeable in its analysis. First, it notes that "the Unions have been *injured in their business, i.e. organizing carpentry industry employees, negotiating and policing collective bargaining agreements, and securing jobs for their members.*" (Emphasis added) 648 F.2d at 537. Second, the panel majority refers to its holding in the following manner: "a Union may have standing to sue an employers' group for for conspiring *to injure the Union by eliminating companies that employ the Union's members from the service market* . . ." (Emphasis added) 648 F.2d at 538.

The first type of injury allegedly suffered by the Union is injury to the Union itself in its business of organizing, negotiating and the like. The second type of injury allegedly suffered by the Union is derivative injury which exists only to the extent that the Union is harmed as a result of injury suffered by its members who are employed by the allegedly boycotted subcontractors and who suffered lost or diminished employment. This distinction is of fundamental importance in proper analysis of antitrust standing. Neither type of injury results in standing for the Union.

A. The Ninth Circuit Incorrectly Applied Recognized Formulations Concerning Standing.

Section 4 of the Clayton Act authorizes treble damage actions on the part of "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. On its face, the statute requires that actions for injury related to an antitrust violation be shown to have arisen "by reason of" acts forbidden in the antitrust laws. Accordingly, the lower courts, including the Ninth Circuit, have imposed a standing requirement that limits recovery to those "whose protection is the fundamental purpose of the antitrust laws." *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 125 (9th Cir. 1973), *cert. denied*, 414 U.S. 1045 (1973).[9]

Two elements must be considered in determining whether standing exists under Section 4 of the Clayton Act. First, plaintiff must allege injury to "business or property"; this Court has interpreted the statutory phrase as referring to "commercial interests or enterprises." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972). The second statutory requirement that the injury be one that occurred "by reason of" an antitrust violation, has occasioned the development of different "tests" or formulations.

Under the "direct injury" test, courts consider whether the plaintiff's claimed injury is "direct" or "remote," granting standing only in the former case.[10] This approach would deny standing where, as here, the claimant is separated from the violation by intermediate victims. See, *In re*

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[9] In *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), this Court noted its approval of the judicially imposed limitations on the classes of persons who may recover under Section 4:

> The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.

405 U.S. at 263 n.14. *See also Southern Pacific Co. v. Darnell-Teanzer Lumber Co.*, 245 U.S. 531, 532 (1918), in which the Court recognized the "endlessness and futility of the effort to follow every transaction to its ultimate result."

[10] *See, e.g., Comet Mechanical Contractors, Inc. v. E. A. Cowen Construction, Inc.*, 609 F.2d 404 (10th Cir. 1980); *Farnell v. Albuquerque Publishing Co.*, 589 F.2d 497 (10th Cir. 1978); *Plumbers & Steamfitters Local 589 v. Morris*, 511 F. Supp. 1298 (E.D. Wash. 1981).

Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d at 127. The most expansive formulation, the "zone of interest" test, is the same as that articulated in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), to govern standing to challenge administrative agency action. Under this test, a plaintiff need only allege that the interest which he seeks to protect is arguably within the zone of interests protected by the relevant antitrust laws. This approach produces no different result here than a proper application of the target area test.[11]

The "target area" test of standing, the most carefully developed standard, has been applied by the majority of the Courts of Appeal, including the Ninth Circuit,[12] and was the test purportedly utilized by the Ninth Circuit in the instant case.[13] Quoting with approval from *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d at 127, the Ninth Court stated that: "The 'target area' has been described as that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." 648 F.2d at 537.

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[11] The "zone of interest" test appears to be largely a creation of the Sixth Circuit in an abbreviated line of cases, see *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975), whose continued viability after this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), was questioned by the Seventh Circuit in *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1169 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979), but was recently reaffirmed by the Sixth Circuit in *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir. 1981).

[12] *See, e.g., Commerce Tankers Corp. v. National Maritime Union of America*, 553 F.2d 793 (2d Cir. 1977); *Donovan Construction Co. of Minnesota v. Florida Telephone Corp.*, 564 F.2d 1191 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978); *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976); *Long Island Lighting v. Standard Oil*, 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976); *Contreras v. Grower Shipper Vegetable Association of Central California*, 484 F.2d 1346 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955); *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

The "target area" approach involves a two step analysis. First the endangered area of the economy must be identified and then it must be ascertained whether plaintiff's alleged injuries occurred within that area of the economy. As stated by Judge Ely:

> A proper application of 'by reason of' focuses on whether the anticompetitive conduct directed against an area of the economy injured business operations conducted by the claimant in that sector of the economy.

In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129.

1. The Union's Business of Organizing and Negotiating Is Not Within the Area of the Economy Endangered by the Breakdown in Competition.

In the instant case the allegedly anticompetitive conduct is a group boycott of certain subcontractors in the construction industry. The breakdown of competition is among construction subcontractors, and the area of the economy or the industry endangered is construction subcontracting. This is recognized by the Ninth Circuit itself:

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[13] The Ninth Circuit's peculiar treatment of the "zone of interest" test warrants comment. Although the panel held, albeit wrongly, that the Union had standing under the "target area" test, it then rendered the following advisory opinion in contravention of the well-established jurisdiction limits of Article III:

> We therefore *suggest* that, *in future cases*, parties who would be denied standing because they were not "foreseeable victims" under the traditional target area test should still be permitted to litigate their claims if to do so would further the policies underlying the antitrust laws.

648 F.2d at 538 n.18 (emphasis added).

> Such conduct could well restrain competition since success in getting others to adhere to the conspiracy would effectively lock Union-signatory *subcontractors* out of a portion of *the market for carpentry work*. More efficient *subcontractors* who had signed with the Unions and were paying wage rates and fringe benefits equal to or lower than those paid by nonunion *subcontractors* would be precluded from competing for carpentry work required by those who had not signed with the Unions.

California State Council of Carpenters v. Associated General Contractors of California, Inc., 648 F.2d 527, 532. (Emphasis added.)

The Union is not in the business of construction contracting; it is concededly in the business of organizing employees, negotiating and securing jobs for its members. Under any previously recognized application of the "target area" test, the Union does not have standing.[14]

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[14] Of the cases cited by the Ninth Circuit in support of its holding that the Union is within the target area, none is factually or legally analogous. *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976) and *International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n*, 483 F.2d 384 (3rd Cir. 1973), amended 494 F.2d 1353 (3rd Cir. 1974) were not boycott cases and involved a conspiracy between an employer or employers and sham unions who entered into sweetheart contracts. *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136 (5th Cir. 1977) was as stated in the opinion itself not a boycott case; the coaches' injury was not derivative. As noted in *Reibert v. Atlantic Richfield Company*, 471 F.2d 727, 730-31 (10th Cir. 1973) when considering the organized sports cases including *Radovich v. National Football League*, 352 U.S. 445 (1957):

> "Once again these cases are inapposite. Each case alleges antitrust violations directed against the blackballed party. Appellant Reibert [who lost his job due to an allegedly anticompetitive merger] is not faced with a similar problem. If there is any antitrust violation, it is directed toward the petroleum industry."

2. No Standing Exists Where the Injury to the Union Is Derivative of the Loss of Employment Suffered by the Employees of the Boycotted Companies.

The analysis of the standing question under the target area test is quite different if the injury complained of is injury caused by the loss of employment by Union members employed by the subcontractors. The result, however, is still the same — no standing exists.

It has long been recognized that the diminished employment suffered by employees as a result of anticompetitive conduct affecting their employers does not confer standing. In *Gutierrez v. E. & J. Gallo Winery Co., Inc.*, 604 F.2d 645 (9th Cir. 1979) farmworkers complained that a price discrimination conspiracy foreseeably diminished employment opportunities. The Court found the injury to be outside the target area. The claim was "an effort to use the antitrust laws 'as a vehicle to achieve goals unrelated to the purposes for which the antitrust laws were passed.' " 604 F.2d at 646. Similarly, farm workers complaining that a lettuce price-fixing scheme reduced available work were denied standing in *Contreras v. Grower Shipper Vegetable Association*, 484 F.2d 1346 (9th Cir. 1973).

In *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir. 1973), an employee was laid off following an allegedly anticompetitive merger between his employer and the defendant. The Tenth Circuit held that Reibert had not alleged injury cognizable under the antitrust law.

> "Termination of employment will often occur whether a merger is legal or illegal. It is the natural effect flowing from two similarly structured businesses combining their assets to maximize efficiency."

Reibert v. Atlantic Richfield Company, 471 F.2d 727, 731.

In *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied* 342 U.S. 919 (1952), the unions representing employees in the motion picture industry alleged that as part of a conspiracy by the major film studios to eliminate the independents, the major studios had discharged employees represented by the unions. The Ninth Circuit denied standing.[15]

These cases also demonstrate that to the extent the Union is complaining of direct injury to its business of organizing, negotiating and the like, it is not within the area of economy endangered by the anticompetitive conduct — the construction business.

Thus, although individual employees of the boycotted subcontractors may suffer from a loss of business suffered by their employers, this ripple effect does not confer standing either on the employees themselves or on a union representing them. If it did, employees would have standing to sue in virtually every antitrust case. As aptly noted by Judge Sneed in his dissent: "Instantly it raises the possibility of standing for antitrust purposes of employees, whether unionized or not, whose employer is injured in *his* business by an unlawful conspiracy." 648 F.2d at 543.

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[15] The Ninth Circuit there stated:

> "The appellants' connection with the alleged illegal conspiracy is not such as would bring them within the contemplation of the antitrust law. The entire import of the alleged conspiracy, insofar as competitive conditions are concerned, is the attempt to destroy the Independents. Any restraint on commercial competition would occur in the production of motion pictures and we fail to see how the appellants are in a position to complain about the situation.
>
> * * *
>
> The damage alleged to have been suffered by appellants does not flow from any injury to the competitive situation of the motion picture industry, that is, their injury has not arisen from the acts allegedly perpetrated against the independents." *Conference of Studio Unions v. Lowe's Inc.*, 193 F.2d 51, 54 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

B. The Union Cannot State an Antitrust Damage Claim Under This Court's Decisions in Brunswick and Illinois Brick.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) are not denominated or considered "standing" cases. Nevertheless, the reasoning in both those cases is directly applicable in this case. The Ninth Circuit failed to consider either.

In *Brunswick*, this Court refused to permit a bowling alley to recover for lost business when Brunswick purchased a competing bowling alley on the brink of bankruptcy. Although the allegedly illegal acquisition of the competing bowling alley was a "but for" cause of the lost business of the original plaintiff and the injury was foreseeable and within the target area of the illegal conduct, recovery was denied because the injury was not due to that element which made the acquisition illegal, namely the monopolistic nature of the purchaser. This Court mandated that plaintiffs prove an "antitrust injury" defined as that which "the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. at 489. It is no longer sufficient that the injury flow from the illegal act apart from that which made the act illegal.

The analysis in *Brunswick* is strikingly similar to the analysis of standing under the second element of the "target" test which is in large part an examination of the causation issue. In *Brunswick*, the Court resolved the issues of standing presented here, choosing to analyze the issues as causation issues.

The Union is foreclosed from bringing the instant lawsuit for injury to its business under *Brunswick*. That which is allegedly illegal in the instant case is the "group boycott" of Union subcontractors. The effect of the boycott and what makes it illegal is the restraint upon competition among construction subcontractors because of the possibility that more efficient subcontractors signatory to agreements with the Union will be foreclosed from the market. The Union injury does not flow from that which makes the defendants' acts illegal — restraint upon competition among subcontractors. The Union has never been and could never be a construction contractor.

Indeed, the Sherman Act condemns boycotts, price-fixing and the like because of the negative effect on competition in the commercial marketplace. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). In stark contrast, the Union interest lies in restraining competition in the marketplace. In *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 (1940) it was noted that "elimination of price competition based on differences in labor standards is the objective of any national labor organization."

It is apparent that, although this case arises under a fact situation quite different from *Brunswick*, the antitrust analysis is quite similar. The Court in *Brunswick* noted that the suing parties were, in effect, complaining that they were denied the benefits of reduced competition because, had the failing bowling centers gone out of business, they would have reaped the benefits of decreased competition.

> The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for 'the protection of *competition*, not *competitors*,' *Brown Shoe Co. v. United States*, 370 U.S. at 320. It is inimical to the purposes of these laws to award damages for the type of injury claimed here.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488. (Emphasis in original).

The Union here seeks to collect damages for injury to its business of restraining competition. The antitrust laws were most certainly not designed to protect this type of interest or conduct which itself would violate the antitrust laws were it not for the labor exemption.

Not only does *Brunswick* foreclose the suit by the Union for damage to the Union's business, it also forecloses suit by the Union for the alleged injury resulting from losses by the employees of the boycotted subcontractors. The Ninth Circuit itself recognized this in *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977). Plaintiffs' beer distributorships were terminated by Olympia after Olympia acquired the Hamm's brewing operation. The acquisition was allegedly violative of antitrust laws. The Court stated:

> If we were to assume that Olympia's acquisition of Hamm's did present a § 7 violation, it would only do so because of a probable lessening of competition in the production of beer. A competing manufacturer might have the right to bring a private action against Olympia. Therefore, while Lenore has proved an injury, he has not shown that he has suffered an ". . . antitrust injury . . . of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." [*Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).] *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495, 500.

This Court's decision in *Illinois Brick* further demonstrates that the Union is not among the types of plaintiffs permitted to sue under Section 4. The Court rejected an antitrust claim by indirect purchasers who had been forced to absorb overcharges passed on to them by the direct victims of a price-fixing conspiracy. The Court held that while indirect purchasers may well have suffered foreseeable economic harm, for antitrust purposes only the direct purchaser was injured in his business or property. Various policy considerations leading to this result were addressed. These considerations apply in the instant case involving a chain of alleged victims from landowners to subcontractors to the Union. The risk of duplicative recovery is very real, the tracing and proof problems are staggering, and it is not practicable to join all alleged victims at each tier of the chain.

C. Connell Does Not Support the Union's Standing in This Case.

The Ninth Circuit panel majority has asserted that the instant case is "virtually the obverse" of the decision in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), 648 F.2d at 532. *Connell* is said to stand for the proposition that a union is liable under the antitrust laws for coercing a stranger employer, that is, one with whom the union has no collective bargaining relationship, to agree not to use non-union subcontractors. It is asserted that the instant case involves "employers conspiring to coerce stranger employers, i.e., those with whom the Unions had no collective bargaining relationship, to agree not to use union-signatory subcontractors." 648 F.2d at 530.

In *Connell*, the stranger employer that had been directly coerced by the union brought suit. Excluded non-union employers did not seek and were not given standing. In this case, neither the stranger landowners who allegedly were coerced to boycott stranger subcontractors, nor the stranger subcontractors themselves are bringing suit. Unlike *Connell* the directly affected stranger victim is not a plaintiff. *Connell* does not support any argument that the Union has standing and, to the contrary, demonstrates the derivative, speculative and remote nature of the Union claim.

III.
CONCLUSION.

The balance between federal labor laws and antitrust regulation must be maintained. Left untouched, the Ninth Circuit panel majority decision would dismantle the carefully developed structure of federal labor law and policy which governs labor-management relations in the United States, would reintroduce federal district judges as regular arbiters of labor disputes, and would subject employers and labor unions to the draconian sanctions and overwhelming costs of antitrust litigation arising from ordinary labor-management concerns. Employers who take action in a labor dispute with a union — whether they have a collective bargaining relationship with the union or are neutrals enmeshed in a dispute brought to their property by a union — must not be faced with the doomsday machinery of major antitrust litigation. Under the federal labor laws employers and multiemployer groups must be free to protect their legitimate interests, one of which is continuing to operate despite the existence of a labor dispute. While some union objectives may be thwarted and the effectiveness of organizational campaigns blunted by such actions, these labor disputes are exempt from the antitrust laws and are instead governed by the National Labor Relations Act. The existence of boycott allegations does not change this result because of alleged injury to the Union's supposed "business" or injury to the Union as representative of the employees of the boycotted companies. Neither results in antitrust standing.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1981

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,
PETITIONER

v.

CALIFORNIA STATE COUNCIL OF CARPENTERS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether a complaint alleging that certain general contractors conspired to coerce owners of land and other general contractors to award construction subcontracts to firms that have not signed collective bargaining agreements with the plaintiff Unions states a restraint of trade cognizable under the antitrust laws.

2. Whether such conduct on the part of employers is entitled to a labor exemption from the antitrust laws.

3. Whether, under Section 4 of the Clayton Act, 15 U.S.C. 15, the Unions have standing to recover damages caused by the alleged conspiracy.

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ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,
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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.*

INTRODUCTION AND SUMMARY OF ARGUMENT

This action began with a complaint filed in a federal district court by two organizations composed of labor union district councils and affiliated local unions ("the Unions"). The amended complaint alleged, *inter alia*, that petitioner Associated General Contractors of California, Inc. ("AGCC" or "petitioner") and its member contractors had injured the Unions by means of a conspiracy in violation of the Sherman Act, 15 U.S.C. 1 (Pet. App. A at 2-6). The suit was terminated in the district court by dismissal of the complaint for failure to state a claim.

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* The National Labor Relations Board agrees that the complaint states an antitrust claim that does not come within the labor exemption (Points I and II, *infra*), but takes no position on the standing question (Point III, *infra*).

The complaint alleged that for more than 25 years the Unions had maintained a series of collective bargaining agreements with AGCC, a multiemployer bargaining organization for building and construction contractors in California with at least one thousand member employers, and that the Unions had also negotiated "memorandum contracts" with approximately three thousand other California contractors who, although not members of AGCC, have agreed to be bound by the terms of the AGCC agreement (the "master" agreement) (Pet. App. E at 4-9, 12-14). The complaint charged a continuing conspiracy by AGCC and its members to weaken or destroy collective bargaining relationships between the Unions and the employer parties to the bargaining agreements, including the "memorandum contractors" (*id.* at 15-16, Para. XXIII). Among the acts allegedly committed in furtherance of the conspiracy was the coercion of "owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with [the Unions]" (*id.* at 18, Para. XXIV (4)). The Unions claimed to have suffered $25 million in damages, and they sought a trebling of those damages under Section 4 of the Clayton Act, 15 U.S.C. 15.[1]

The district court dismissed the antitrust claim of the complaint because it concluded that the Unions' real concern was merely that AGCC member employers were refusing to accede to a master labor agreement contractual provision that would bar them from giving construction subcontracts to other employers who had not signed agreements with the Unions (Pet. App. C at 5-15).[2]

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[1] We have reproduced the Unions' "First Claim for Relief," which states its antitrust claim, in an appendix to this brief.

The court of appeals, one member dissenting, reversed because it concluded that the allegations of coercion against "owners of land and other letters of construction contracts," aimed at making them hire "contractors and subcontractors who are not signatories" to the collective bargaining agreements, adequately charged a group boycott of union-signatory contractors (Pet. App. A at 12-13) with an injurious effect on the market for carpentry work (*id.* at 18). The court rejected contentions that antitrust sanctions for such a boycott violation should be unavailable because of possible remedies under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, or because of any type of "labor" exemption from the antitrust laws. The court concluded that the Unions had standing to recover damages for the alleged violation because the complaint charged that AGCC and its members had both injured the Unions in their business and intended to do so (*id.* at 46, 51).

I.

The Unions' amended complaint contains many allegations that amount to nothing more than charges that AGCC and its members sought to operate construction projects without regard to the terms of the master labor agreement and to resist agreeing to any provisions that would require them to deal only with union signatory subcontractors—*i.e.* those who had agreed to comply with the terms of the labor agreement, including its union hiring hall provisions. No antitrust claim is stated in such allegations. But the court of appeals was correct in concluding that a violation of Section 1 of the Sherman Act is alleged in the charge that AGCC had coerced persons with power to let construction contracts into dealing with nonunion firms, since such coercive conduct would thereby "effectively lock union-signatory subcontractors out of a portion of the market for carpentry work" (Pet. App. A at 18). Total exclusion of the boycotted group need not be alleged in order to state a Sherman Act violation.

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[2] The amended complaint also sought relief for breach of contract under Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185, and for violations of various state laws, including the state antitrust laws (Pet. App. E at 23-28). The district court dismissed the Section 301 claim pending arbitration under the contract and dismissed the state law claims as pre-empted by federal law (Pet. App. C at 15-23). The court of appeals affirmed those rulings (Pet. App. A at 58-66), and the Unions have not sought further review of them.

It is improper to rely on speculations concerning a plaintiff's real motives for bringing a law suit in sustaining a motion to dismiss the complaint for failure to state a claim. Accordingly, the district court erred in dismissing the Unions' amended complaint on the basis of suspicions that the facially valid Sherman Act allegation is nothing more than a mask for an effort by the Unions to force AGCC and its members to adhere to union signatory subcontractor clauses.

II.

The court of appeals correctly concluded that, while Section 20 of the Clayton Act, 29 U.S.C. 52, and Section 4 of the Norris-LaGuardia Act, 29 U.S. 104, exempt certain labor-related activities from antitrust sanctions, they do not immunize coercion of one business group by another business group that results in a restraint on a commercial market, even if the coercion has labor-related objectives. Neither does the so-called "nonstatutory exemption," which is derived from federal labor policies favoring collective bargaining and "the association of employees to eliminate competition over wages and working conditions" (*Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622 (1975)), immunize such conduct. Such conduct does not occur within the context of collective bargaining or otherwise advance federal labor policies.

Petitioner's contention that the federal labor laws constitute a comprehensive scheme of regulation that precludes the application of the antitrust laws to the boycott alleged here is unsound. This Court has repeatedly held that substantial federal regulation of an industry, without more, is insufficient evidence of a congressional intent to exempt it from the antitrust laws. The narrower argument that remedial provisions of the federal labor laws should be the Unions' exclusive remedy for the group boycott alleged is also without merit in view of the fact that the Court expressly rejected a similar contention in *Connell*. In any event, petitioner has not shown that the labor laws contain a remedy for the group boycott violation alleged here.

III.

Throughout this century the courts have been in agreement that Section 4 of the Clayton Act, 15 U.S.C. 15, does not authorize treble damages suits by every person who can trace some damage to business or property back to a violation of the antitrust laws. Congress, which has maintained the language of Section 4 unchanged, has evidently acquiesced in that general proposition. The courts have not, however, agreed on a single test for determining who may sue under this Section. "Direct injury" tests, "target area" tests, and—more recently—"antitrust injury" theories have been employed. In our view, these are labels given to assortments of policy considerations, and we submit that a direct inquiry into those considerations provides a clearer and more accurate means of determining whether a plaintiff has standing to recover damages for a particular antitrust violation.

We submit that a plaintiff who alleges that the defendant has imposed a restraint on competition in a commercial market and that he has been damaged in his business or property as a result should have standing to pursue a treble damages claim unless prudential considerations dictate otherwise. Among those considerations are the speculative character of the plaintiff's damages, *e.g.*, the difficulty—apparent on the face of the complaint—of linking the alleged losses to the violation in question. In our view such a difficulty is present here in tracing diminutions in members' dues and fees received by the Unions back to the alleged coercion of general contractors, and for that reason the court of appeals erred in concluding that the Unions had standing to pursue their treble damages claim.

ARGUMENT

I. THE COMPLAINT ALLEGES A RESTRAINT OF TRADE WITHIN THE MEANING OF SECTION 1 OF THE SHERMAN ACT

On appeal from the grant of a motion to dismiss for failure to state a claim, "reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party" (*Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)), and they may not affirm "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" (*Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)). Under those liberal standards,[8] the court of appeals correctly concluded that the complaint alleges a restraint on the market for subcontractual carpentry work.

To show a violation of Section 1 of the Sherman Act, the Unions must allege acts that, in some commercial market, "restrain trade." Three markets that might conceivably be implicated in any scheme to boycott Group A for dealing with Group B, which in turn represents the economic interests of Group C, are the markets in which each of the three groups competes. In the present case, those are the market for carpentry contracting services, the market for labor union representation services, and the market for carpentry employee services. We need not pause long over the last two, because the court of appeals' reversal of the district court's dismissal of the complaint is limited to a holding that the Unions have adequately alleged an antitrust violation by charging a group boycott of subcontractors who had signed with the Unions, thereby "effectively lock[ing the] union-signatory subcontractors out of a portion of the market for carpentry work" (Pet. App. A at 18; see also *id.* at 52). The Unions have not petitioned this Court to enlarge the judgment in their favor by giving them the right to go to trial on other antitrust claims, so the question whether the complaint alleged any other kinds of restraints cognizable under the Sherman Act is not before the Court. See, *e.g.*, *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1973).

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[8] The law places no greater burden of pleading on antitrust plaintiffs than on others. See *McLain* v. *Real Estate Board*, 444 U.S. 232, 246 (1980); *Radovich* v. *National Football League*, 352 U.S. 445, 453-454 (1957).

In any event, we doubt that the complaint alleges Sherman Act violations with respect to the market for employee services (*i.e.* the labor market) or the market for union representation services. The complaint was filed by the Unions on their own behalf (see Pet. App. E at 5) and not by any of the employees they represent; and there is no allegation of an effort outside of a collective bargaining context to affect wages in the labor market or to boycott particular employees.[4] The complaint thus alleges no monopsonistic employer restraint on the labor market. Compare, *e.g.*, *Radovich* v. *National Football League*, 352 U.S. 445 (1957); *Anderson* v. *Shipowners*

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[4] Because the complaint does not allege any employer restraint that would prevent union members from working for non-signatory employers, the allegation of the restraint of signatory employers (Pet. App. E at 18-19, Para. XXIV(5)) does not necessarily translate into a restraint on the employment opportunities for union members.

Association of the Pacific Coast, 272 U.S. 359, 363 (1926); *Newburger, Loeb & Co.* v. *Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977), cert. denied, 434 U.S. 1035 (1978); *Mackey* v. *National Football League*, 543 F.2d 606, 616-617 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977); *Quinonez* v. *National Association of Securities Dealers, Inc.*, 540 F.2d 824, 828-829 (5th Cir. 1976).[5]

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[5] Since the complaint does not allege monopsonistic restraints on the labor market, the Court need not consider whether, as petitioner's argument (Pet. Br. 12-14) necessarily assumes, *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940), implicitly overruled earlier cases holding that employer restraints on wage competition came within the purview of the Sherman Act, at least where the highly restrictive test for interstate commerce then in effect was met (compare *Anderson* v. *Shipowners Association of the Pacific Coast, supra*, with *Industrial Association of San Francisco* v. *United States*, 268 U.S. 64 (1925)). We note that *Apex* may be read as holding simply that, although "[s]trikes or agreements not to work, entered into by laborers to compel employers to yield to their demands" may eliminate "price competition based on differences in labor standards," such an effect is not "the kind of curtailment of price competition prohibited by the Sherman Act" (310 U.S. at 503-504). See *Allen Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797, 806 (1945); *Mackey* v. *National Football League, supra*, 543 F.2d at 611.

In any event, although *Apex* has received honorable mention in subsequent decisions of the Court (see, *e.g.*, *United Mine Workers* v. *Pennington*, 381 U.S. 657, 664 (1965); *H.A. Artists & Associates* v. *Actors' Equity Association*, 451 U.S. 704, 715 n.16 (1981), since the time of *United States* v. *Hutcheson*, 312 U.S. 219 (1941), this Court's decisions concerning restraints that, either directly or indirectly, involve employee wages or working conditions, have focused first on the question whether either express statutory labor exemptions or exemptions implied in federal policies respecting collective bargaining (see pages 12-18, *infra*) exempt the activities in question from any conceivable restraints of the antitrust laws. See Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 263 n.48, 264-265 (1955); Leslie, *Principles of Labor Antitrust*, 66 Va. L. Rev. 1183, 1199 (1980). But see Handler & Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 Colum. L. Rev. 459, 481-482 (1981). Where such exemptions apply, there is no need to confront the problem of substantive liability absent the exemption.

With respect to a restraint on the market for labor union services, it cannot as easily be said that the complaint fails to make such an allegation. The Unions' own trade is, according to the complaint, representing employees in collective bargaining (Pet. App. E at 4, Para. IV), and the Unions do allege (*id.* at 20, Para. XXV) that AGCC restrained the unions in their "business activities." That the court of appeals did not discern in these allegations an assertion of an *anticompetitive* restraint on the market for labor union representation services may reflect a view that the Unions were not fundamentally asserting any injury to their ability to compete with other labor organizations.[6]

Whatever the court of appeals' reasons, however, for confining its theory of the litigable antitrust claim to the allegation with respect to an anticompetitive restraint on the market for carpentry work performed by subcontractors, the court's decision to do so, as we have said, is not here on review. With respect to the question of substantive antitrust liability that the case does present, we submit that the court of appeals was entirely correct.

The complaint alleged that AGCC and its members "coerced * * * owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with [the Unions]" (Pet. App. E at 18, Para. XXIV(4)) and that this activity was one of several that constituted a restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. (*id.* at 20, Para. XXV). Coercion of such persons to deal with nonsignatory contractors with respect to carpentry jobs is perforce coercion *not* to deal with signatory contractors concerning those jobs. Contrary to petitioners' contention (Pet. Br. 23 n.12), the court of appeals properly read this as an allegation of some form of group boycott—an attempt to "lock union-signatory subcontractors out of a portion of the market for carpentry work" (Pet. App. A at 18). This claim thus essentially alleges a group boycott in a commercial market, a claim that should at least survive a motion to dismiss for failure to state a substantive claim. See, *e.g.*, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211 (1951); *Eastern States Lumber Association* v. *United States*, 234 U.S. 600 (1914).[7] It is not necessary to allege that such a boycott, which obviously would significantly interfere with the ability of union-signatory contractors and subcontractors to compete for construction contracts, is aimed at foreclosing them entirely from the market. See *Associated Press* v. *United States*, 326 U.S. 1, 17 (1945).

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[6] In any event, as we explain below (pages 29-30, note 26), there are theoretical difficulties in finding an antitrust violation in attempts to affect the market for labor union services.

While the complaint does not specify the type of coercion employed, the court of appeals properly rejected any suggestion that the motion to dismiss could be decided on grounds of extra-record claims that the alleged coercive conduct consists of nothing more than urging resistance to union demands for agreements that work be subcontracted only to union-signatory firms.[8]

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[7] In light of the narrow question presented, we take no position on whether the "boycott" conspiracy alleged here should be treated in a labor relations context as *per se* illegal or subject to a rule of reason standard. See *Larry V. Muko, Inc.* v. *Southwestern Pennsylvania Building & Construction Trades Council*, 670 F.2d 421 (3d Cir. 1982), petition for cert. pending, No. 81-1798 (filed Mar. 26, 1982); *Commerce Tankers Corp.* v. *National Maritime Union*, 553 F.2d 793, 802 (2d Cir.), cert. denied, 434 U.S. 923 (1977); *Mackey* v. *National Football League*, *supra*, 543 F.2d at 619. If the case is remanded and the allegation substantiated by evidence, this issue can be considered by the courts below.

[8] Petitioner's argument that the court of appeals misread the complaint (Pet. Br. 23 n.12, 28) echoes the view of the district court (Pet. App. C at 8-10) and of Judge Sneed, in dissent (Pet. App. A at 68-73), that the Unions' real complaint is that AGCC and

Petitioner's reliance on *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940), for the proposition that the Sherman Act excludes restraints related to labor conditions (Pet. Br. 12-15) effectively ignores these allegations of coercion directed against the union-signatory contractors and subcontractors.[9] Certainly the Unions' alleged grievances include various measures for resisting union organizing that do not come within the purview of the antitrust laws,[10] and hostility to union organization is the

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its members will not agree to sign contracts with union signatory provisions of the kind held unlawful in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). It is clearly improper, however, to grant a motion to dismiss on the basis of speculations—however plausible—concerning what the proof at trial may be. (In *Connell* the Court held unlawful under Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), an agreement—obtained by a union from a general contractor with whom the union had neither an existing nor a prospective collective bargaining relationship—providing that the contractor would deal only with subcontractors who had signed contracts with the union. The Court now has before it, in *Woelke & Romero Framing, Inc.* v. *NLRB*, and two companion cases, Nos. 80-1798, 80-1808, and 81-91 (argued Mar. 3, 1982), the question whether such clauses are unlawful when a union seeks to obtain them in agreements with contractors whose employees the union does represent, in order to assure that negotiated contract benefits for the pool of union-represented construction workers will not be impaired by subcontracting to nonunion contractors.)

[9] In its argument on the standing question, petitioner essentially contradicts its *Apex* argument here by asserting (Pet. Br. 43) that the Unions are not within the "target area" of the alleged conspiracy because "the businesses directly endangered by [the alleged] acts are the unionized contractors." See also brief of amicus curiae Associated General Contractors of America (AGCA Br. 19).

[10] For example, no antitrust claim is stated by allegations charging such conduct as breaches of the terms of existing collective bargaining agreements (Pet. App. E at 19-20, Para. XXIV (7)) and attempts to carry out construction operations on a nonunion basis by creating "double-breasted contracting situations" in which "union and nonunion divisions" are established (Pet. App. E at 17, Para. XXIV (2)).

chief motive attributed to the alleged conspiracy. But an antitrust conspiracy may be unlawful because of the means used, even if the end is lawful. *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 625 (1975). *Apex* cannot be read as foreclosing antitrust scrutiny of a restraint on the ability of certain contractors and subcontractors to compete merely because an ultimate purpose of imposing that restraint is to strengthen AGCC's bargaining position vis-a-vis the Unions.

II. FEDERAL LABOR LAW PROVIDES NO BASIS FOR WITHHOLDING APPLICATION OF THE ANTITRUST LAWS TO THE WELL-PLEADED RESTRAINT OF TRADE IN THIS CASE

Petitioner and its supporting amici curiae contend (Pet. Br. 32-39; Chamber of Commerce ("Chamber") Br. 10-19; Pacific Maritime Association ("PMA") Br. 7-11) that the alleged general contractors' boycott of unionized subcontractors is immune from the antitrust laws because it constitutes part of a union-management dispute over terms and conditions of employment. They rest their contention on a number of theories: the express statutory exemptions in the Clayton Act and the Norris-LaGuardia Act; the "nonstatutory," or implied, exemption delineated by the Court in *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), and *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, *supra*, 421 U.S. at 622-623; a doctrine of exclusive agency jurisdiction arising from the "comprehensive regulatory scheme" provided by the National Labor Relations Act; and an allegedly fatal inconsistency between remedies provided in the labor laws and those in the antitrust laws. These arguments are, for the most part, predicated on a reading of the complaint that ignores the allegations of coercion directed against employers who are not parties to the labor dispute. As applied to the alleged boycott of subcontractors, these arguments represent an unduly expansive view of the employers' labor exemption.

A. Employers Have No Statutory Immunity From the Antitrust Laws for Boycotts Directed Against Commercial Firms Outside the Bargaining Unit Notwithstanding an Ultimate Labor-Related Objective

Petitioner contends (Br. 32-37) that the statutory labor exemption under Section 20 of the Clayton Act, 29 U.S.C. 52, should be construed to afford exemptions of equivalent scope to labor groups and employer groups in labor relations matters.[11] In particular, it relies on the provision that no injunction "shall prohibit any person or persons, whether singly or in concert * * * from ceasing to patronize or to employ any party to a [labor] dispute." This argument simply ignores the nature of the antitrust allegation here at issue. The persons whom AGCC and its members are accused of boycotting are not parties to any labor dispute; they are firms excluded from the subcontracting market because they happen to adhere to union contracts. The Clayton Act standing by itself has never been construed to permit such a boycott. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 474-477 (1921); *American Medical Association* v. *United States*, 317 U.S. 519, 536 (1943). Indeed, in discussing the rights that Section 20 was intended to protect, the relevant Senate committee report expressly excluded the type of coercion alleged here. S. Rep. No. 698, 63d Cong., 2d Sess. 20-30 (1914).

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[11] Petitioner did not rely on a specific statutory exemption in the district court or the court of appeals, and the court of appeals' discussion of Section 20 of the Clayton Act, 29 U.S.C. 52, was therefore essentially sua sponte (Pet. App. A at 23-24). Petitioner failed to invoke Section 4 of the Norris-LaGuardia Act, 29 U.S.C. 104, either in the courts below or in its petition for a writ of certiorari.

To be sure, the Court, in *United States* v. *Hutcheson*, 312 U.S. 219, 230-231 (1941), recognized a broader statutory labor exemption by construing the Clayton Act exemption together with the injunctive restraints of the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.* Reading those provisions "as a harmonizing text of outlawry of labor conduct" (312 U.S. at 231), the Court held that a unilateral secondary boycott by a union was exempt from both antitrust injunctive relief and antitrust damages. But it defined the exemption (312 U.S. at 232) as available to a union only "[s]o long as [it] acts in its self-interest and does not combine with non-labor groups." Accordingly, in *Allen Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797 (1945), the Court rejected a contention that the exemption applied to a price-fixing and group boycott arrangement established by agreements among electrical equipment manufacturers, electrical contractors, and the union that represented the employees of those employers. The Court reasoned that, whatever exemption the union might enjoy while acting on its own, it could claim no such exemption when it aided and abetted business groups who were violating the Sherman Act through an anticompetitive agreement.

Surely the group of employers charged with entering into the boycott agreement alleged in this case—aimed at coercing one set of businesses into at least partially foreclosing the subcontracting market to another set of businesses—is no more entitled to a labor exemption than either the union or the business groups in *Allen Bradley*. See *H. A. Artists & Associates* v. *Actors' Equity Association*, 451 U.S. 704, 717 n.20 (1981); *Mackey* v. *National Football League, supra*, 543 F.2d at 611.

The objections of petitioner and amicus PMA (Pet. Br. 32-33; PMA Br. 9) to the reliance of the court below (Pet. App. A at 23) on the "pro-labor purpose" of the statutory exemption are without merit. The court properly recognized that the thrust of the Clayton Act and LaGuardia Act exemptions is protection of workers' rights to organize;[12] and it did not err in suggesting that it would be anomalous to extend the statutory exemption to an allegation of what would otherwise be an illegal restraint on a commercial market, on the ground that those imposing the restraint possessed an anti-labor motive. The court's regard for the dominant purpose of the Clayton Act and Norris-LaGuardia Act exemptions does not represent a refusal to recognize that employers, as well as unions, may claim a statutory antitrust immunity for some activities. Indeed, the court expressly recognized a protection for multiemployer collective bargaining agreements that restrain competition in wages and working conditions.[13] It simply declined to find that protection applicable to restraints on commercial firms imposed by employers outside a collective bargaining context.

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[12] Sections 6 and 20 of the Clayton Act, 15 U.S.C. 17 and 29 U.S.C. 52, were included so as to redress a perceived imbalance in the labor market. Laborers were no longer negotiating with individual shop owners; instead they confronted aggregations of capital in a corporate form. Giving equal rights to laborers and employers, therefore, did not mean giving additional organizational rights to employers; it meant giving laborers the same right to organize in unions that employers had to organize in corporations. S. Rep. No. 698, 63d Cong., 2d Sess. 28, 30-31 (1914); 51 Cong. Rec. 16320-16321, 16338 (1914). See also 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman).

A similar philosophy is expressed in the Norris-LaGuardia Act's declaration of public policy. 29 U.S.C. 102. As this Court has observed, "The Norris-LaGuardia Act * * * was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining. The Act aimed to correct existing abuses of the injunctive remedy in labor disputes." *Brotherhood of R.R. Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30, 40 (1957). Petitioner has not shown that injunctive remedies for anticompetitive restraints imposed by employers on commercial markets was one of the "existing abuses" Congress sought to correct.

[13] As the court properly noted (Pet. App. B at 6 n.1), however, *United Mine Workers* v. *Pennington*, 381 U.S. 657, 664-669 (1965), expresses a limitation on this rule.

Petitioner's contention (Br. 38) that the exemption also protects from antitrust liability an employer's right to break an employment contract is beside the point, since breach of contract is not the gravamen of the antitrust claim that the court of appeals found properly stated in the complaint.

Petitioner's objection to a supposed "double standard" for employers and employees (Pet. Br. 39) may be a complaint that, although it may not coerce contractors to give their contracting jobs to nonunion firms, unions in the construction industry are free, under the construction industry proviso to Section 8(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(e), to seek agreements requiring the general contractors whose employees the union represents to subcontract only to union signatory contractors.[14] Such an objection, however, goes not to any unequal application of the statutory labor antitrust exemption but rather amounts to a disagreement with the decision of Congress, in recognition of special circumstances of the construction industry, to permit such union signatory agreements as an exception to the general prohibition of the NLRA against secondary agreements. Courts are not at liberty to fashion the equivalent of an additional construction industry proviso out of the labor exemptions of the Clayton Act and the Norris-LaGuardia Act.

B. An Anti-competitive Inter-Employer Agreement Outside the Context of Collective Bargaining Is Not Entitled to a "Nonstatutory" Exemption

As this Court has explained in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, *supra*, 421 U.S. at 622, the so-called "nonstatutory" labor antitrust exemption is derived from the policy of the federal labor laws favoring collective bargaining and the association of employees to eliminate competition over "wages and working conditions." It is consistent with that policy to grant antitrust immunity to multiemployer bargaining—*i.e.* to permit employers to agree among themselves on a common position regarding wages and working conditions in a bargaining unit and to negotiate fixed labor prices and working conditions with the union or unions that represent the bargaining unit employees. And it is not inconsistent with that policy to permit the employers to seek "through group bargaining to match increased union strength." *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 94-95 (1957) ("*Buffalo Linen*"), quoted in *Charles D. Bonanno Linen Service* v. *NLRB*, No. 80-931 (Jan. 12, 1982), slip op. 5.[15]

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[14] There is a controversy concerning whether such agreements may be made applicable only to particular jobsites on which, and at times when, union employees are working (see *Pacific Northwest Chapter of the Association Builders & Contractors, Inc.* v. *NLRB*, 654 F.2d 1301, 1306-1307, 1308-1322 (9th Cir. 1981) (en banc), cert. granted, No. 80-1808 (argued Mar. 3, 1982). It is undisputed, however, that the proviso extends at least some protection to union signatory subcontractor clauses. *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, *supra*, 421 U.S. at 626-635.

It is not, however, a logical concomitant of the federal policy underlying the nonstatutory exemption to permit employer groups to exert pressure on employers outside the bargaining unit to give their subcontracting business to nonunion firms and thereby lock unionized firms out of a portion of the subcontracting market. Indeed, permitting such conduct would obviously undermine that policy. This does not mean that all conduct aimed either directly or indirectly at inducing employers to repudiate their collective bargaining relationship with a union is a violation of the antitrust statutes. It merely means that such conduct does not advance the policy of the nonstatutory labor exemption and thus does not warrant an antitrust immunity when it also operates as coercion on commercial firms that excludes other firms from a portion of a commercial market.

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[15] The exemption is lost, however, when the employers agree with the union to impose conditions on employers outside the bargaining unit (*FMC* v. *Pacific Maritime Association*, 435 U.S. 40, 61-63 (1978); *United Mine Workers* v. *Pennington*, *supra*, 381 U.S. at 666-667), except to the extent that agreements expressly sanctioned by the NLRA for members of the construction and garment industries may have the effect of fixing conditions to be observed by employers who contract in the future with employers who were originally parties to the agreements.

C. The Boycott Alleged in This Case Is Not Beyond Antitrust Scrutiny By Virtue of Comprehensive Labor Regulation Under the National Labor Relations Act or Differences in Remedies Between the Labor Laws and the Antitrust Laws

Petitioner asserts (Pet. Br. 29-31) that the remedies under the antitrust laws—in particular, the treble damages remedy—are inconsistent with the less onerous remedies available under federal labor law, which do not include punitive damage awards of any kind. The labor law remedy should, therefore, petitioner argues, be deemed exclusive in any case in which remedies under both statutes would otherwise be available. Petitioner, supported by amici (AGCA Br. 13; PMA Br. 14) and the dissenting judge below (Pet. App. A at 82), also makes the broader argument (Pet. Br. 22, 34) that labor law remedies are exclusive in this case—and the operation of the antitrust laws completely precluded—simply by virtue of existing comprehensive regulation of the collective bargaining process.

Petitioner's arguments are, for the most part, directed to matters not in issue here; the antitrust claim recognized by the court of appeals concerns a boycott directed at commercial contractors, not, for example, a breach of contract by AGCC and its members for which the Unions could sue under Section 301 of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. 185 (see Pet. Br. 29-30). But what is more important, the arguments are at odds with decisions of this Court.

A similar inconsistent remedies argument was expressly rejected by this Court in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, *supra*, 421 U.S. at 633-634. There the Court held that a union could be made subject to a treble damages suit for an anticompetitive restraint on a commercial market, even though the means by which the union effected the restraint constituted a violation of Section 8(e) of the NLRA—a violation that could be remedied by an order of the NLRB or by a suit for compensatory damages under Section 303 of the LMRA, 29 U.S.C. 187. Acceptance of petitioner's argument, whatever its merits, would appear to require overruling *Connell*.[16]

The broader argument also runs afoul of established law. This Court has repeatedly held that the mere existence of substantial regulation of an industry is insufficient evidence of a congressional intent to exempt it from the antitrust laws. *E.g.*, *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981). See also *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, *supra*, 381 U.S. at 688-691 (opinion of White, J.); *id.* at 732-733 (opinion of Goldberg, J.). In *Jewel Tea*, the Court concluded (381 U.S. at 684, 688-691, opinion of White, J.) that a proper accommodation of labor and antitrust laws warranted according a limited antitrust exemption to an agreement that effectively controlled product market competition where the agreement also had an "immediate and direct" effect on the employees' hours of work. But there is no basis in either the plurality opinion of Justice White or the concurring opinion of Justice Goldberg for the argument that *any* conduct remotely related to the collective bargaining process is exempt from the antitrust laws.[17]

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[16] *Connell* does not settle the question regarding treble damage remedies for conduct that constitutes a violation of Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. 158(b)(4), for which the Section 303 damages remedy was provided in 1947. The dissenting opinion pointed to legislative history of the 1947 amendments to the National Labor Relations Act as indicative of a congressional intent to make this remedy the exclusive damages remedy and to preclude the application of sanctions under the antitrust laws. 421 U.S. at 640-646. The Court deemed this history irrelevant "to the question whether Congress meant to preclude antitrust suits based on the 'hot cargo' agreements that it outlawed in 1959." *Id.* at 634. It found no evidence suggesting "that labor-law remedies * * * were intended to be exclusive" for violations of Section 8(e).

One need not accept the application of antitrust sanctions for conduct violative of Section 8(b)(4), however, in order to conclude that there is no *exclusive* labor law remedy for the type of commercial boycott alleged here. As explained below (pages 20-22, *infra*), it does not appear that there is *any* direct remedy under the labor laws for such conduct.

In any event, petitioner has not shown any inconsistency between antitrust remedies for the alleged boycott conduct and provisions of the labor laws—nor has it even demonstrated that the conduct, standing by itself, is within the reach of the NLRA. The NLRB has held that the Act does not forbid discrimination by a single employer against *another employer*, even when the discrimination is based on the union membership of the second employer's employees. *Plumbers Local 447* (*Malbaff Landscape Construction*), 172 N.L.R.B. 128, 129 (1968). Accord, *Edward R. Carey*, 201 N.L.R.B. 368, 369-370 (1973).[18] In some circumstances, however, *em-*

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[17] Justice Goldberg concluded that "unions and employers are exempt from the operations of the antitrust laws for activities involving subjects of mandatory bargaining" (381 U.S. at 735), but that conclusion clearly does not compel the view that the kind of boycott conduct alleged here—coercion of commercial firms inducing them to foreclose a portion of a commercial market to other commercial firms who have entered into contracts with labor unions—is within the exemption.

[18] In *Malbaff*, a case involving union pressure against a general contractor to discharge a nonunion subcontractor, the Board overruled an earlier decision involving the termination of a subcontractor by a general contractor under pressure from the Engineers, with which it had a collective bargaining agreement, to enforce the union signatory subcontractor clause of the agreement. *Northern California Chapter, The Associated General Contractors of America, Inc. (St. Maurice, Helmkamp & Musser)*, 119 N.L.R.B. 1026 (1957), enforced *sub nom. Operating Engineers Local 3* v. *NLRB*, 266 F.2d 905, 909-910 (D.C. Cir.), cert. denied, 361 U.S. 834 (1959). In *Musser*, a Board majority concluded that, since termination of the subcontractor resulted in the removal of all its employees

ployees who have been discharged or otherwise discriminated against on the basis of their union membership or lack thereof have been granted relief under Section 8 (a)(3) and (1) of the NLRA against the general contractor or other employer who compelled their employer to discriminate against them. See, *e.g.*, *Dews Construction Co.*, 231 N.L.R.B. 182 n. 4 (1977); *Fabric Services, Inc.*, 190 N.L.R.B. 540, 541-542 (1971). The theory of such cases is that the party who caused the employees' employer to discriminate against them has directly exercised a right of control over the tenure or working conditions of the employees. Under this doctrine, members of the Unions who are working for a union signatory subcontractor on a particular project may have a remedy under the NLRA against the party who directly causes their discharge from the job because of their union membership. But this remedy does not address the coercion directed at the general contractors alleged in the complaint and provides no relief for anyone as to contracts that union signatory subcontractors are precluded from obtaining as a result of that coercion. It is obviously not

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from the construction project because of their membership in a union other than the Engineers, the general contractor was in violation of Sections 8(a)(1), 8(a)(2), and 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(1)-(a)(3), and the Union was guilty of violating Sections 8(b)(1)(A) and 8(b)(2), 29 U.S.C. 158(b)(1)(A) and (b)(2). 119 N.L.R.B. at 1029-1036 (opinion of Members Rogers and Jenkins), 1040-1041 (opinion of Member Bean). Member Bean, however, emphasized that he would find no violation where, in compliance with a union signatory clause, a general contractor refused to do business with *prospective* subcontractors, since it would be only a matter of speculation what particular employees might thereby be deprived of employment. Accordingly, he and two other members of the Board dismissed the complaint insofar as it alleged that the general contractor violated the Act by enforcing the union signatory subcontracting clause against prospective subcontractors. *Id.* at 1029. Thus, even under *Musser*, there would be no NLRA remedy for a boycott of union subcontractors that exerts its effect before the subcontractors are engaged.

a basis for barring the application of Sherman Act sanctions to the group boycott of employers alleged here.

III. THE UNIONS LACK STANDING TO RECOVER DAMAGES UNDER SECTION 4 OF THE CLAYTON ACT FOR THE ANTITRUST CLAIM ALLEGED

1. The Unions have alleged that they have suffered damages of $25 million as a result of antitrust violations by AGCC and its members (Pet. App. E at 22). There seems little doubt that they have alleged injury in fact so as to satisfy the constitutional minima. See *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979). The question is whether, for the particular claim alleged—the foreclosure of unionized subcontractors from part of the carpentry subcontracting market—the Unions have standing to seek damages under Section 4 of the Clayton Act, 15 U.S.C. 15. That section provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *."

This is a question of congressional intent. *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975). The legislative history of Section 4 is sparse and throws little or no light on the question of the standing of the Unions to recover on the claim alleged here.[19] And the provision, as this Court has remarked (*Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979)), "[o]n its face * * * contains little in the way of restrictive language." Nevertheless, "[t]he lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii* v.

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[19] See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977); Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L. J. 809, 812 n. 9 (1977). See also note 20, *infra*.

Standard Oil Co., 405 U.S. 251, 263 n.14 (1972). In defining the class of those eligible to recover under Section 4, the courts have, for the most part, relied on the provision's requirement that the injury for which damages are sought be suffered "by reason of [something] forbidden in the antitrust laws". See, *e.g.*, *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 125 (9th Cir.), cert. denied, 414 U.S. 1045 (1973); *Reibert* v. *Atlantic Richfield Co.*, 471 F.2d 727, 731 (10th Cir.), cert. denied, 411 U.S. 938 (1973); *GAF Corp.* v. *Circle Floor Co.*, 463 F.2d 752, 757 (2d Cir. 1972), cert. dismissed, 413 U.S. 901 (1973); *Billy Baxter, Inc.* v. *The Coca Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971).[30]

2. The theories by which the courts have construed this language as precluding a right of recovery by particular claimants vary. Principally they have held either that the "by reason of" language requires some showing that the claimant's injury was the "direct" result of the violation

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[30] The assumption that Congress did not intend a universal remedy in damages is a sound one in view of the fact that it has steadfastly retained the language that now appears in Section 4 in the face of restrictive judicial constructions. See *Rubin* v. *United States*, 449 U.S. 424, 430 (1981).

Congress enacted Section 4 of the Clayton Act five years after the seminal decision in *Loeb* v. *Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910), imposed the "direct injury" test on the identical language in former Section 7 of the Sherman Act, ch. 647, 26 Stat. 210. In 1955 it again used the same language in enacting Section 4A of the Clayton Act, 15 U.S.C. 15a, which gives the United States the right to recover damages; and, despite the widespread judicially imposed restrictions on the damages remedy for private parties, Congress made no adjustment in the language of Section 4, although it touched on the subject matter by repealing the superseded Section 7 of the Sherman Act (Act of July 7, 1955, Pub. L. No. 137, Section 3, 69 Stat. 283). On the other hand, it has taken action with respect to damages rulings with which it has disagreed. Compare Title III of the Antitrust Improvements Act of 1976, 15 U.S.C. 15c *et seq.*, with *Hawaii* v. *Standard Oil Co.*, *supra*.

alleged (*e.g.*, *Reibert* v. *Atlantic Richfield Co.*, *supra*, 471 F.2d at 729) or that it requires a showing that the claimant's injury was in the "target area" of the alleged unlawful act, whether or not another person received the immediate impact of the act (*e.g.*, *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, *supra*, 481 F.2d at 127-129); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295-1296 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972)). See, generally, Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U. L. Rev. 374 (1976).[21]

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[21] A third line of analysis—framed, not strictly as a standing issue, but as a question whether the plaintiff has suffered "antitrust damages" or "injury"—also derives from the "by reason of" language in Section 4. Thus, in *GAF Corp.* v. *Circle Floor Co.*, *supra*, 463 F.2d at 757-759, GAF sought treble damages for losses incurred in the course of a proxy contest in which the defendant corporation sought to acquire GAF. The court held that, whether or not the acquisition might diminish competition in the floor tile installation market, GAF's damages did not flow from such an injury to competition and thus could not be recovered under Section 4.

This Court cited *GAF* in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, 429 U.S. at 489 n.14. *Brunswick*, in which a trial had been held on the complaint challenging the defendant's acquisitions of bowling centers under Section 7 of the Clayton Act, 15 U.S.C. 18, was not a standing case; but some lower courts have fashioned an additional element for standing out of part of this Court's explanation for barring plaintiff's recovery for losses that it suffered as a result of *increased* competition stimulated by Brunswick's acquisitions. The Court in *Brunswick* explained (429 U.S. at 489; emphasis in original):

> [F]or plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

The Sixth Circuit has incorporated this notion in its "zone of interest" test for Section 4 standing. *Chrysler Corp.* v. *Fedders*

The Unions would plainly lack standing under the direct injury test. As we explained in Point I, the antitrust claim at issue is a claim that unionized carpentry subcontractors were foreclosed from a portion of the subcontracting market by coercion directed at general contractors and owners of land who might, absent the coercion, have engaged them for particular jobs. The direct injuries, therefore, are to the coerced contractors and owners (who are denied a free choice of subcontractors based on factors other than whether the subcontractors would work under terms of the agreement with the Unions) and to unionized subcontractors foreclosed from a portion of the carpentry subcontracting market. The Union's injury is derived from the injury to the foreclosed subcontractors. Traditionally courts have denied standing to plaintiffs with merely derivative injury—those such as creditors, lessors, employees, and suppliers, who merely have a financial interest in the viability of the victims of antitrust violations.[23]

Under the "target area" test, the result is less clear. If one looks to the subjective intent of the defendant to

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Corp., 643 F.2d 1229, 1234-1235 (1981), cert. denied, Nos. 80-2222 and 81-218 (Oct. 13, 1981). The concept has also been incorporated in the target area theory employed in some Ninth Circuit decisions. *E.g.*, *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 499-500 (1977). See also *Ostrofe* v. *H. S. Crocker Co.*, No. 77-3985 (9th Cir., Mar. 8, 1982), slip op. 1135-1136 (Kennedy, J., dissenting).

[23] See, *e.g.*, *Reibert* v. *Atlantic Richfield Co.*, *supra* (employee of company suffering direct injury); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972) (landlord); *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166, 169-171 (2d Cir.), cert. denied, 395 U.S. 943 (1969) (patent licensor with reduced royalties because of injury to licensees); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 395 (6th Cir. 1962) (supplier); *Loeb* v. *Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910) (stockholders and creditors claiming under Sherman Act predecessor of Section 4 of the Clayton Act).

establish the target, then the court below was correct in finding the Unions within the target area. The complaint alleges that the boycott of union signatory contractors was motivated simply by a desire to destroy the Unions (Pet. App. E at 21-22, Para. XXVI); any destruction of competition in the market for carpentry subcontracting was, according to this allegation, merely incidental to a vendetta against the Unions. The Unions were thus not only within a target area—they were the target; and it is for that reason that the court below concluded they had standing (Pet. App. A at 51-57). On the other hand, if one determines the target area by defining "the area of the economy in which the elimination of competition occurred" (*In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, *supra*, 481 F.2d at 128), then the Unions are almost surely not in the target area, since they do not operate in the market for carpentry subcontracting and could therefore show no injury to themselves in that market.[28]

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[28] This formulation of target area theory was described by its author, Judge Ely (481 F.2d at 128), as deriving from an early Ninth Circuit case, *Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51 (1951), cert. denied, 342 U.S. 919 (1952), in which the court held that a plaintiff seeking to recover under Section 4 must show not only that an act committed by the defendant had injured him, but that "he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry" (193 F.2d at 54-55). The plaintiff association of motion picture labor unions in that case was barred from recovering damages under Section 4 because "the import of the alleged conspiracy, *insofar as competitive conditions* [*were*] *concerned*" was an attempt to destroy independent movie producers, and the unions did not operate in that area of the economy because they did not produce motion pictures, compete with producers, or purchase from them (*id.* at 54; emphasis added).

This concern with linking the injury to competitive breakdown strongly resembles the "antitrust injury" inquiry described above (page 24, note 21, *supra*). The Unions' Section 4 claim would also appear to be barred under the *Brunswick*-inspired analysis.

Those two tests rest on similar policy considerations, and some commentators have suggested that they are little more than different labels for the same analysis. Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum. L. Rev. 988, 994 n.90 (1977); Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 830 (1977). We believe that those policy considerations are relevant to the standing question, but we would formulate the test differently.

All tests for Section 4 standing require at a minimum some showing of causality in fact—indeed the "by reason of" language in Section 4 plainly mandates such a showing. We submit that a plaintiff who adequately alleges (1) a restraint on competition in a commercial market and (2) a claim that he has been harmed in his business or property as a result—direct or indirect—of that restraint has standing to seek damages under Section 4 *unless* prudential considerations dictate otherwise. See *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961).

Factors to be considered in determining whether a plaintiff who alleges injury in fact traceable to an antitrust violation should be allowed to pursue his claim for treble damages under Section 4 include (1) whether the damages are speculative and very difficult of proof because more than a few evidentiary links stretch between the alleged antitrust violation and the claimed loss or because independent factors may have produced the losses in question; (2) whether there is a serious risk of duplicative recoveries; (3) whether there exists another class of potential plaintiffs who would clearly be injured by the alleged competitive restraint if it in fact exists and whose claims the judicial system could more effectively accommodate.[24]

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[24] We do not mean to suggest that a plaintiff would lack standing merely because a more immediately injured group appears to be in a better position to sue. There may be circumstances in which that group will feel inhibited, because of contractual arrange-

These are all concerns that have undergirded the various Section 4 standing tests applied by the courts. See, *e.g.*, *Bowen* v. *New York News, Inc.*, 522 F.2d 1242, 1255-1256 (2d Cir. 1975), cert. denied, 425 U.S. 936 (1976) (damages too speculative); *Miley* v. *John Hancock Mutual Life Insurance Co.*, 148 F. Supp. 299, 302 (D. Mass.), aff'd, 242 R.2d 758 (1st Cir. 1957) (same); *Calderone Enterprises Corp.* v. *United Artists Theater Circuit*, *supra*, 454 F.2d at 1295 (standing should be denied where damages are too speculative and the putative plaintiff class so numerous that "over-kill would result); *Loeb* v. *Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910) (stockholder's injury duplicates that of corporation). Although this Court expressly disclaimed resolving a standing question in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 728 n.7 (1977), its holding that an indirect purchaser could not employ a "pass-on" theory to recover damages for an overcharge traceable to price-fixing at the level above the direct purchaser rests on similar policy considerations, *i.e.*, avoiding unduly complicated proceedings in establishing the damages suffered by the indirect purchaser (*id.* at 732) and protecting "the social interest in the efficient administration of justice and the avoidance of multiple litigation" (*id.* at 738). See also *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 493-494 (1968) (rejecting the use of a pass-on defense to price-fixing charges because of difficulties of proof). We submit that direct consideration of the policy considerations that gave rise to the various standing tests is more illuminating than an effort to apply those highly conclusory tests themselves.

In the present case, the speculative character of the damages sought militates against permitting standing for the Unions.[26] The Unions are suing for injury to

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ments or other links to the potential defendants, from bringing suit. See note 25, page 29, *infra*.

[26] We note also that if, in fact, AGCC has engaged in the coercion alleged, and unionized subcontractors have lost business as a consequence, those subcontractors possess the classic economic incentive

themselves: presumably this is loss of income in the form of dues and fees, traceable to a loss of membership resulting either from an expansion of nonunion job opportunities (and reduced incentive of employees to join the Unions) or the reduced number of construction jobs on which a union security provision can be invoked to require membership (see Section 8(f)(2) of the NLRA, 29 U.S.C. 158(f)(2)).[26] In addition, if lower dues are

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to file suit. A trebling of their damages should adequately vindicate the policies of the Sherman Act.

We do not, however, emphasize that factor here because, as Judge Sneed suggested in his dissent (Pet. App. A at 78-79) through the metaphor of Brer Rabbit's self-proclaimed abhorrence of landing in the briar patch, it is not clear that the subcontractors would be motivated to sue. If, however, the unionized firms were to respond to the alleged boycott by breaching their collective bargaining agreements with the Unions rather than filing an antitrust suit against those who are allegedly coercing the general contractors and owners of land, the Unions might, through vigorous pursuit of their breach of contract remedy under Section 301 of the LMRA, 29 U.S.C. 185, increase the incentive of the unionized firms to consider invoking the antitrust remedy against the entity responsible for squeezing them out of the subcontracting market because of their adherence to the bargaining agreement.

[26] We do not believe that the character of the business from which the Unions derive their income (organizing employees so as to eliminate competition among them over wages and working conditions) disqualifies them from recovering for losses suffered as a result of a restraint on a commercial market of the kind the antitrust laws were intended to prohibit, so long as the other factors we discuss do not militate against standing. (If the Unions were the victims of retail price-fixing of goods or services, for example, they could recover for that violation at the retail level like any other consumer.)

We emphasize, however, that we are addressing only the question of standing with respect to a claim of injury deriving from the alleged restraint on the market for carpentry subcontracting—the claim on which the court of appeals focused. We would not urge that a claim based on a restraint on the "market" for labor union representation services would be cognizable under the antitrust laws. The procompetition mandate of those laws is at odds with labor organizations' fundamental mission of organizing employees so as to eliminate competition among them over wages and working charged Union members who cannot obtain work for a specified period, the reduced amount traceable ultimately to the anticompetitive injury to the unionized subcontractors might also be a recoverable loss. This, however, represents a highly elaborate chain of proof. The Unions must show that their members lost jobs as a result of the antitrust violations and resigned from the Unions or reduced their dues payments as a result of lost work opportunities attributable to those violations. Other economic factors leading to reduced membership would have to be ruled out. Adding these elements of proof to the difficulties of showing that a particular unionized subcontractor would have obtained a particular contract or contracts absent coercion by AGCC on the firm letting the contract makes the Unions' loss speculative indeed. See *Nassau County Association of Insurance Agents, Inc.* v. *Aetna Life & Casualty Co.*, 497 F.2d 1151, 1153 (2d Cir.), cert. denied, 419 U.S. 968 (1974) (loss of membership and dues to insurance agents' organization allegedly resulting from defendants' unlawful termination of contracts with agents too "remote" for Section 4 standing).

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conditions. That mission is, of course, protected by federal labor laws and thus generally cannot be thwarted by antitrust sanctions (see pages 14-15, 16-17, *supra*); but recognizing an exemption from the antitrust laws is not the same as concluding that the antitrust laws extend affirmative protections to the activities. But see *Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F.2d 1172, 1176-1178 (5th Cir. 1976); *International Association of Heat & Frost Insulators* v. *United Contractors Association*, 483 F.2d 384, 397-398 (3d Cir. 1973).

Furthermore, if the Unions were permitted to pursue their present claim, and the proof at trial showed, *not* that competition in the carpentry subcontracting market had been restrained by coercive acts of AGCC foreclosing union signatories from the market without regard to their relative efficiencies, but only that the Unions had been unsuccessful in efforts to impose restraints on the subcontracting market so as to close it to nonunion firms, the Unions would have no damage claim cognizable under the antitrust laws. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*.

In sum, the number of steps intervening between the alleged coercion by AGCC on general contractors and owners of land and financial loss to the Unions (together with the existence of less remote potential plaintiffs) make it inappropriate to permit the Unions to sue for treble damages under Section 4 for injury produced by such a subcontractor boycott.[27] If the Court believes it inappropriate to rest such a judgment on the complaint alone, then a remand to the district court for an inquiry into the precise theory of the Unions' loss in relation to the boycott may be called for. In any event, the court of appeals erred in holding, on the present record, that the Unions have standing to litigate the antitrust claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1982

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[27] This case does not present the question whether the Unions would have standing to seek injunctive relief against the alleged coercive boycott.

APPENDIX

FIRST CLAIM FOR RELIEF

XXIII.

Since on or about April 1, 1974, and continuing to date, defendants and each of them have entered into a plan, scheme, agreement and conspiracy, knowingly, willfully and maliciously, whose purpose and ends are to abrogate, destroy, undermine, and weaken the collective bargaining relationship between plaintiffs and each of them and defendants and each of them, and between plaintiffs and other parties to the above described collective bargaining agreements; included within the other parties are the California Drywall Contractors Association and all "memorandum contractors" to the above described master collective bargaining agreements.

XXIV.

Pursuant to said plan, scheme, agreement and conspiracy, defendants and each of them knowingly, willfully and maliciously committed the following acts:

(1) Changed names and corporate status without reason, and as a part of the above described plan, agreement, scheme, and conspiracy, in a fraudulent manner;

(2) Created and maintained double-breasted contracting situations, in which contractors have established and maintained union and non-union divisions, departments, and/or other such entities;

(3) Advocated, encouraged, induced, and aided nonmembers of defendant Associated General Contractors of California, Inc. to refuse to enter into collective bargaining relationships with plaintiffs and each of them;

(4) Advocated, encouraged, induced, coerced, aided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs and each of them;

(5) Advocated, induced, coerced, encouraged, and aided members of Associated General Contractors of California, Inc., non-members of Associated General Contractors of California, Inc., and "memorandum contractors" to enter into subcontracting agreements with subcontractors who are not signatories to any collective bargaining agreements with plaintiffs and each of them;

(6) Held open-shop meetings for members of defendant Associated General Contractors of California, Inc. and non-members, where said members and non-members were induced, encouraged, coerced, and aided to maintain non-union shops, double-breasted operations, and to do and complete all of the activities described herein. These non-members referred to in this subparagraph were both memorandum contractors and non-memorandum contractors.

(7) Breached the collective bargaining agreements between defendants and each of them and plaintiffs and each of them, by failing to pay agreed-upon wages, by failing to use the hiring hall, by failing to pay Trust Fund contributions, by failing to observe other terms and conditions of employment, and by generally weakening the good-faith requirement of the collective bargaining agreements.

XXV.

The purpose and effect of the above described activities, plan and conspiracy are oppressive, unreasonable, and illegal, and are in restraint of trade and an unlawful interference and restraint of the free exercise of the business activities of plaintiffs and each of them, all in violation of 15 U.S.C. Section 1. The purpose and effect of the above described activities, plan and conspiracy, in addition, are to weaken, destroy, and restrain the trade of certain contractors, both members of the Associated General Contractors of California, Inc. and non-members, who are "memorandum contractors," who have faithfully performed the terms and conditions set out in the master collective bargaining agreements described above. The effect of this restraint on trade is to further weaken and destroy plaintiffs in this matter. These activities are in restraint of the free exercise of plaintiffs' trade and an interference therein, all in violation of 15 U.S.C. Section 1.

XXVI.

Said actions are malicious and oppressive, in that they are designed to weaken and destroy plaintiffs and each of them and their local unions and District Councils in their contractual relationships and in their ability to act according to their purposes and charters.

XXVII.

As a proximate cause of the plans, scheme, and conspiracy described above, and as a proximate result of the actions and activities described above on the part of defendants and each of them, plaintiffs and each of them have been damaged in the sum of $25,000,000.00.

XXVIII.

Pursuant to Title 15, U.S.C. Section 15, plaintiffs request that the damages prayed for be trebled to $75,000,000.00.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1962 673617 [illegible]

Docket Sheet

NO. 81-334-CFX

TITLE Associated General Contractors of California, Inc.,
Petitioner
v.
California State Council of Carpenters and Carpenters 46
Northern Counties Conference Board, et al.

DOCKETED
Aug. 14, 1981

COURT
United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: James P. Watson
	Counsel for Respondents: Victor J. Van Bourg,
Aug. 14, 1981	Petition for writ of certiorari filed. (Record filed).
Sept. 30, 1981	DISTRIBUTED. 10-16.
Oct. 19, 1981	Response requested.
Nov. 14, 1981	Brief of respondent, The Harold E. Shugart Company, Inc., in support of petition filed.
Nov. 18, 1981	DISTRIBUTED. 12-4. (STRICKEN)
Nov. 23, 1981	Order extending time to file a response to the petition until Dec. 2, 1981.
Dec. 2, 1981	Brief of respondents California State Council of Carpenters and Carpenters 46 Northern Counties Conference Board in opposition filed. (D).
Dec. 9, 1981	DISTRIBUTED. 1-8.
Jan. 11, 1982	Petition GRANTED. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Feb. 20, 1982	Motion to dispense with printing the appendix filed.
Feb. 23, 1982	DISTRIBUTED. 2-26. (Above motion).
Feb. 25, 1982	Brief of Pacific Maritime Association as amicus curiae filed.
Mar. 1, 1982	The motion of the parties to dispense with printing the joint appendix is GRANTED.
Feb. 27, 1982	Brief for the petitioner filed.
Mar. 1, 1982	Brief, amicus curiae, for the Chamber of Commerce of the United States filed.
Feb. 25, 1982	Motion of Associated General Contractors of America, Inc. for leave to file a brief as amicus curiae filed.
Mar. 16, 1982	Order extending time to file the respondents' brief on the merits until Apr. 15, 1982.
Mar. 22, 1982	The motion of Associated General Contractors of America, Inc. for leave to file a brief as amicus curiae is GRANTED.
Mar. 29, 1982	The motion of respondent for divided argument to permit American Federation of Labor and Congress of Industrial Organizations to present oral argument as amicus curiae is DENIED.

(Over)

81-334

Title

No.

DATE	PROCEEDINGS AND ORDERS
Apr. 7, 1982	Order further extending time to file the respondents' brief on the merits until May 15, 1982.
May 6, 1982	Order further extending time to file the respondents' brief on the merits until June 1, 1982.
May 7, 1982	Brief. amicus curiae, for the U. S. filed.
Jun. 2, 1982	Brief for the respondents filed.
June 3, 1982	Brief, amicus curiae, For The American Federation of Labor and Congress of Industrial Organizations filed.
July 13, 1982	CIRCULATED.
July 21, 1982	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a supplemental brief as amicus curiae filed.
Sept. 9, 1982	The motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a supplemental brief as amicus curiae is GRANTED.
Sept. 24, 1982	Reply brief for the petitioner filed. (D).
Oct. 5, 1982	ARGUED.